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No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN B. TAYLOR, WARDEN, STAUNTON CORRECTIONAL CENTER,

Petitioner,

v.

WILLIAM EVANS-SMITH,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES THE NEW RULE DOCTRINE PERMIT A FEDERAL APPEALS COURT TO ANNOUNCE ON COLLATERAL REVIEW OF A STATE PRISONER'S CONVICTION THAT THE CONSTITUTION REQUIRED THE PROSECUTION TO PROVE INDIVIDUALLY AND BEYOND A REASONABLE DOUBT EVERY BASIC FACT, AND EVERY INFERENCE TO BE DRAWN FROM THE BASIC FACTS, THAT THE PROSECUTION RELIED UPON TO PROVE THE PRISONER'S GUILT?

II. DID THE COURT OF APPEALS REFORMULATE AND MISAPPLY THE *JACKSON* "RATIONAL FACT-FINDER" STANDARD THAT GOVERNS SUFFICIENCY-OF-THE-EVIDENCE CLAIMS IN FEDERAL COLLATERAL PROCEEDINGS?

LIST OF PARTIES

The petitioner in this Court, John B. Taylor, Warden of Virginia's Staunton Correctional Center, was the respondent in the proceedings below. The respondent in this Court, William Evans-Smith, a former Virginia prisoner freed as a result of the mandate of the Court of Appeals in this case, was the petitioner in the proceedings below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 19 F.3d 899 (4th Cir. 1994). (A. 1-29). The Fourth Circuit's order denying the Warden's petition for rehearing and suggestion for rehearing en banc is reprinted in the appendix. (A. 81).[1]

The unpublished order of the United States District Court for the Eastern District of Virginia, which denied

[1] References to the Appendix to this Petition will be designated (A. ___). References to pages of the Joint Appendix filed in the Court of Appeals will be designated (R. ___).

Evans-Smith's petition for habeas corpus relief for the reasons stated from the bench, is reprinted in the appendix, together with the pages of the transcript of the hearing in which the District Court stated its reasons for denying relief on the claim that the evidence was insufficient to support the conviction.

The opinion of the Court of Appeals of Virginia reversing Evans-Smith's first conviction and remanding the case for the new trial which gave rise to the instant litigation is reported as *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 361 S.E.2d 436 (1987).

JURISDICTION

The opinion of the Fourth Circuit was entered on March 21, 1994. The order denying the Warden's petition for rehearing and suggestion for rehearing en banc was entered April 18, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS OF LAW

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution states in pertinent part, "[N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

STATUTORY PROVISION

At the time of the murder giving rise to this litigation, Virginia Code § 18.2-32 provided that "murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder in the first degree, punishable as a Class 2 felony.

"All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable as a Class 3 felony." (Va. Code Ann. § 18.2-32 (Repl. Vol. 1988)).

The United States Code, 28 U.S.C. § 2254(a), provides that a Federal court "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

This case presents clear-cut issues of law which are of nationwide importance concerning Federal habeas corpus review of the sufficiency of the evidence in State criminal prosecutions. In order to understand the nature of the ruling of the Court of Appeals which gave rise to these issues, it is necessary to be familiar with the highlights of

the evidence presented by the prosecution at respondent's trial.

Respondent William Evans-Smith was convicted in State court of the 1985 murder of his wife. Respondent's first conviction was reversed by the Court of Appeals of Virginia when it ruled that the trial court had erred in admitting certain evidence involving the victim's statements that her husband had tried to kill her and describing his anger and hostility. *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 361 S.E.2d 436 (1987). In 1989, respondent was again convicted by a jury in the Circuit Court of Loudoun County. His conviction was affirmed without published opinion by the Court of Appeals of Virginia and the Supreme Court of Virginia. He then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, challenging, *inter alia*, the sufficiency of the evidence to support his conviction. That court entered summary judgment in favor of Warden John Taylor, and Evans-Smith appealed to the United States Court of Appeals for the Fourth Circuit. On March 21, 1994, the Fourth Circuit reversed the District Court, and held that the evidence was insufficient to support Evans-Smith's conviction. On April 18, 1994, the Fourth Circuit denied the Warden's petition for rehearing and suggestion of rehearing en banc.

Evidence at Trial

In 1985, respondent, employed at American University's Foreign Area Studies Office and a retired Army colonel, lived alone with his wife of over 40 years on their

rural estate in Loudoun County, Virginia. Between 10:30 and 11:00 a.m. on Monday, April 15, 1985, their grown daughter, Leslie Cook, arrived at the home to visit her mother. Sensing something amiss in the house, she used her CB radio to summon two men from a nearby farm. (R. 1160-67). Searching the house, one of them found Barbara Evans-Smith dead on the floor of her second floor bedroom. (R. 245-48, 274-76).

The victim was killed by strangulation with a pair of pantyhose which was wrapped three times around her neck and knotted tightly. (R. 718, 721-22). There was internal hemorrhaging in the back of her head which was consistent with blunt force trauma. (R. 723). The victim's nightgown had been ripped open in front, and she was naked from the waist down. (R. 717, 276). Forensic examination revealed no traces of semen and no vaginal injury. (R. 724).

A poorly-conceived effort had been made to stage the scene to look as if the murder had been committed in the course of a rape or robbery. The local medical examiner who viewed the body in the position in which it was found testified without contradiction that the victim had been placed in that position after death. (R. 927-28). The medical examiner who conducted the autopsy was of the opinion that a pair of panties stuffed in the victim's mouth as if to gag her screams had also been placed there after death. (R. 718, 721-22, 1776-78). A button from the victim's nightgown was found on the floor near her bed (R. 368-69), suggesting that the nightgown had been ripped open in the bedroom rather than earlier during the assault. Although the victim's bedroom was in disarray, the respondent's adjoining bedroom was tidy except

for items of his jewelry which had been laid out across his bed. A substantial amount of silverware on open display in the dining room downstairs had been untouched. (R. 338-39). At the foot of the stairs leading to the second floor, a small table had been laid on its side. This table lay straddling the four impressions of its legs in the carpet, defying the law of physics for a toppled object. Under the table, a drawer which belonged in the table had been laid upside down on the carpet on top of its own contents. Lying nearby on its side on the floor was an arrangement of dried flowers which had been on the table, but there was little or no debris or dried petals strewn across the carpet. (R. 424-27, 544, 1164).

The medical examiner who examined the victim at the scene determined that she had died at approximately 6:00 that morning. (R. 927). His conclusion was based upon a method of estimating time of death which can err as much as two hours in either direction. (R. 929). The respondent had told the police that he had eaten breakfast with his wife at a time which he fixed in one statement as early as 5:30 a.m. on the 15th. (R. 680). The contents of her stomach were found upon autopsy to be consistent with the breakfast which he described (R. 724) and to have been ingested no more than 30 to 60 minutes before her death. (R. 724-25). Evans-Smith told the police that he had left for work that morning at 6:20 or 6:25 a.m. (R. 591). He could not estimate his arrival time at work (R. 591, 681), but told the police he had had difficulty with traffic. (R. 681). The only witness to address the respondent's usual arrival time at work testified that he usually arrived between 7:30 and 8:00 a.m. (R. 814). Other

witnesses placed respondent at work at 8:30 or 8:35 on the morning of the murder. (R. 987).

Two days after the murder, a medical doctor examined respondent's person under court order. (R. 847-48). Scratches were observed and photographed on his hands and one upper arm. (R. 412). The doctor who personally observed these scratches and had seen autopsy photographs of the victim's fingernails testified that in his opinion the scratches could have been caused by human fingernails. (R. 849-50, 1806-08). The two medical examiners, who had personally examined the victim's fingernails but seen only photographs of the scratches on respondent's arm, voiced contrary opinions.

There was evidence from which the jury could have inferred that the victim was initially attacked at the kitchen table, rendered unconscious, and dragged up to her second story bedroom where the final strangulation had occurred. The kitchen table was slightly displaced from its usual location (R. 1164), as was a hutch along the wall near the table. (R. 1164, 247, 344). Two faint, parallel drag marks in the waxed surface on the linoleum floor ran from the kitchen table to the doorway into the front hall. (R. 333, 361, 394). Although the police crime scene technician testified that the victim's soft bedroom slippers would not have made these marks (R. 355-56), there was evidence from which the jury could have inferred that the bedroom slippers were not covering the victim's heels at the time she was dragged, but dangling from her toes and about to fall off in the dragging process. Specifically, one of the slippers was found on the kitchen floor near the entrance to the hallway, and the other slipper was found in the front hallway near the small table which

had been laid on its side. (R. 247). The medical examiner testified that the hemorrhaging in the back of the victim's head could have been caused by bouncing against the wooden stairs if she had been dragged feet first up the stairs. (R. 723-24).

Respondent and his wife owned two Dalmatians which their daughter described as "real good watch dogs." (R. 1161-62). When their daughter first came to the home on the morning of the murder, she found one Dalmatian outside, and the other, which she described as extremely fond of the victim, penned up in a laundry room off the kitchen behind two closed doors. She had never before seen the dog confined in that manner. (R. 1161-62).

Loudoun County Sheriff's deputies first approached the respondent shortly after 3:00 p.m. on April 15th at his office in Washington, D.C. When they informed him that his wife was dead, a fact which he supposedly had not previously known, he responded with a rapid succession of questions, including whether she was disfigured, whether she had been raped, whether she was undressed, how she had been killed, who found the body, and whether his daughter had seen her. (R. 578-79, 664). The investigators described respondent as showing some emotion of crying, but there were "absolutely no tears in his eyes at all." (R. 580, 477).[2] Although he told the

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[2] *Respondent's own daughter* testified that, upon first seeing her father after her mother's death,

> . . . he was walking towards me, bent over kind of, and he had his arms outstretched and he kept saying, "Leslie, Leslie, Leslie." And we embraced and I kind

deputies he last saw the victim alive as she waved goodbye to him from an upstairs bedroom window (R. 579, 589), he later told friends that she had last waved to him from the first floor kitchen window. (R. 1139, 1174-75). Likewise, although he told the deputies he had made no stops on his way to work that morning (R. 592), he told a co-worker that he had stopped at the University President's office (R. 990), and he later told another person that he had stopped at a carwash. (R. 1148).

Although respondent could not tell the deputies what time he had arrived at work, on April 27th he called a co-worker while the latter was on vacation in New Mexico and asked him what time the co-worker recalled respondent arriving at work on the 15th. When the co-worker responded that he "quite definitely" remembered respondent's arrival at 8:35, Evans-Smith commented that he had told the deputies he had arrived at 8:15, and suggested "that it would be nice if" the two recalled the same arrival time. (R. 990-91).

Post-Trial Rulings

When respondent contended, in a motion to set aside the verdict, that the evidence had been insufficient to support the jury's decision, the trial court denied his motion in a lengthy, carefully reasoned letter opinion. (A.

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of pushed back away from him and looked at him.
Question: And what did you observe?
Answer: No tears.
(R. 1173-74).

32-43). The Court of Appeals of Virginia affirmed the Circuit Court, finding that:

> [t]he evidence in this case showed that the victim was killed by some criminal agent. There was evidence from which the jury could have found that the petitioner, at the time of her death, was the only person with an opportunity to kill her. Other circumstantial evidence tended to prove his guilt. The totality of the evidence which the jury could have reasonably believed was such that excluded every reasonable hypothesis except that the petitioner was the killer.

(A. 71). The Supreme Court of Virginia affirmed by an unpublished order. (A. 76). This affirmance constituted a judgment on the merits in the Commonwealth's favor. *Stilwell v. Commonwealth*, 219 Va. 214, 226, 247 S.E.2d 360, 367-68 (1978); *Saunders v. Reynolds*, 214 Va. 697, 700, 204 S.E.2d 421, 424 (1974).

In the Federal habeas petition giving rise to this litigation, respondent renewed his challenge to the sufficiency of the evidence along with three other claims.[3] Warden Taylor moved for summary judgment, arguing that the record showed the evidence was sufficient to

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[3] Respondent contended that *North Carolina v. Pearce*, 395 U.S. 711 (1969), required the trial judge in his second trial to reduce the 20-year sentence recommended by his second jury to duplicate the 5-year sentence which had been recommended by the 1985 jury, that his jury had been tainted by extensive pretrial publicity, and that the Commonwealth's Attorney had misrepresented the evidence in closing argument. The District Court denied respondent relief on these claims, and the Court of Appeals found it unnecessary to consider them on appeal.

support Evans-Smith's conviction, and, in a supplement to his brief in support of the motion for summary judgment, that the new rule doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989), required the Federal court to defer to the State Supreme Court's reasonable judgment that the evidence was sufficient to support the conviction. The District Court elected to address the merits without considering the new rule argument, holding that:

> [Evans-Smith] just seeks to have other inferences drawn from [the] testimony. But the jury was not required to do that, and I find that a rational trier of fact could have found beyond a reasonable doubt from this evidence that the defendant was guilty of the murder of his wife.

(A. 80). The Senior District Court Judge felt so confident of his ruling that he denied Evans-Smith a certificate of probable cause to appeal.

Respondent secured his certificate of probable cause from the Court of Appeals, and thereafter a three-judge panel of that Court issued the published opinion giving rise to this petition.

In four key places in its opinion, the Fourth Circuit clearly acknowledged that it was requiring basic facts and preliminary inferences from the basic facts to be proven individually beyond a reasonable doubt:

1. The Court of Appeals reluctantly accorded the jury verdict the benefit of an inference that the scene had been staged, but only because it concluded that, "[w]e believe a rational trier of fact possibly could conclude *beyond a reasonable doubt* that the crime scene was staged." (A. 28, emphasis added).

2. The Court of Appeals thought that a conclusion that the victim had been rendered unconscious in the kitchen and dragged upstairs would require the jury to infer that she had suffered a head injury in the kitchen, and that head injuries from being dragged up the stairs had occurred in the same part of her head. The latter inference the Court characterized as "*unlikely, and subject to reasonable doubt.*" (A. 21 n. 18, emphasis added). Based on this conclusion, the Court quickly concluded that "there is *no* evidence that she was dragged upstairs." (*Id.*, emphasis in original).

3. The Court of Appeals reiterated this conclusion in the following paragraph of the footnote, and then, referring only to the Commonwealth's theory that the victim had been dragged and not, at this point, to respondent's guilt, asked rhetorically, "[w]hat inference was there for the jury to draw *beyond a reasonable doubt*?" (A. 21 n. 18, emphasis added).

4. The Court of Appeals dismissed the testimony clearly indicating that Evans-Smith arrived at work later than his usual time with the comment that, "[s]uch lateness *of itself* is not proof of a crime *beyond a reasonable doubt.*" (A. 12 n. 11, emphasis added).

The rule adopted by the Court of Appeals manifested itself not only in these four express instances, but in many other parts of the Court's analysis where it concluded that basic facts had not been proven beyond a reasonable doubt because the testimony concerning these facts was contradicted, or that reasonable preliminary

inferences from basic facts had not been proven beyond a reasonable doubt because alternative reasonable inferences could have been drawn.[4] The Court summarized its thought process as follows:

> Evans-Smith could no doubt have acted as the prosecution has contended he did. However, the suppositions are derived from acts of his consistent with a husband's perfectly proper behavior mixed with imaginations of behavior for which his presence has not been proven. To start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt that the defendant was guilty. The prosecution has attempted to accomplish only the first alternative, not the second.

(A. 29).

Warden Taylor petitioned the Court of Appeals for rehearing, and suggested a rehearing en banc, arguing that the decision applied an incorrect standard, and that the Fourth Circuit had, by its aberrant analysis, adopted a new rule in violation of *Teague*. The Warden's petition and suggestion were denied in an unpublished order issued April 18, 1994.

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[4] See pp. 23-29 of this petition.

REASONS WHY THE WRIT SHOULD BE GRANTED

In this case a proven murderer was set free because the Fourth Circuit adopted a new rule for the application of the beyond-a-reasonable-doubt standard that is inconsistent with the opinions from this Court, contrary to logic, and in conflict with the express holdings of at least four other Federal Circuits and nine States. Because this case involves the application of the burden of proof that controls every criminal case, it is extremely important that the Court grant certiorari, not only to correct the miscarriage of justice that has occurred in this case, but to insure that State convictions reviewed in this Circuit are not subjected to a standard more stringent than the Constitution requires. The Court can do so either by holding that the Fourth Circuit's rule was not dictated by this Court's case law or by rejecting the Fourth Circuit's rule on the merits, and holding that the beyond-a-reasonable-doubt standard is applicable only to the elements of the offense charged.

I. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT THE RULE ADOPTED BY THE FOURTH CIRCUIT IS NOT DICTATED BY CONTROLLING PRECEDENT AND THEREFORE CANNOT BE ANNOUNCED ON FEDERAL COLLATERAL REVIEW.

Because this case involves federal habeas corpus review of a State criminal judgment, the Court "must determine, as a threshold matter, whether granting [Evans-Smith] the relief he seeks would create a 'new rule' " of constitutional law. *Penry v. Lynaugh*, 492 U.S.

302, 313 (1989); *see also Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion). Although the Court of Appeals purported merely to apply the standard established in *In re Winship*, 397 U.S. 358 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979), it is the Fourth Circuit's reformation and extension of the *Winship-Jackson* standard which require scrutiny under the "new rule" doctrine.

> The interests in finality, predictability, and comity underlying [this Court's] new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent *as by the application of an old rule in a manner that was not dictated by precedent.*

Stringer v. Black, 112 S. Ct. 1130, 1135 (1992) (emphasis added); *see Caspari v. Bohlen*, 114 S. Ct. 948 (1994) (rule sought by prisoner would constitute an extension of, rather than being dictated by, *Bullington v. Missouri*, 451 U.S. 430 (1981)); *Butler v. McKellar*, 494 U.S. 407 (1990) (prisoner could not avail himself of the benefit of *Arizona v. Roberson*, 486 U.S. 675 (1988), because *Roberson* had not been *dictated* by *Edwards v. Arizona*, 451 U.S. 477 (1982), even though the *Roberson* majority had said that the case was directly *controlled* by *Edwards*).

New rule analysis under *Teague* requires a federal court first to determine the date when the prisoner's conviction became final. Evans-Smith's conviction became final on December 13, 1990 when the time within which he might have petitioned for certiorari from the affirmance of his direct appeal expired. The second step in *Teague* analysis is to "[s]urve[y] the legal landscape as it then existed," *Graham v. Collins*, 113 S. Ct. 892, 898 (1993), and "determine whether a State court considering

[the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *see Caspari*, 114 S. Ct. at 953.

Although *Winship* speaks in terms of the prosecution proving "facts," the "facts" which it holds must be proven beyond a reasonable doubt are the ultimate facts constituting elements of the offense, because they are referred to as those "necessary to constitute the crime charged," 397 U.S. at 363, 364. The *Winship* opinion is predicated upon the recognition that the beyond-a-reasonable-doubt standard "is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of fact of all the essential *elements* of guilt." 397 U.S. at 361, *quoting* C. McCormick, *Evidence* § 321, pp. 681-82 (1954) (emphasis added).

Federal courts enforcing the *Winship* standard in habeas corpus review of State criminal judgments were commanded to inquire whether any rational trier of fact:

> could have found the essential *elements* of the crime beyond a reasonable doubt. [Citation omitted]. This familiar standard gives full play to the responsibility of the trier of fact *fairly* to resolve conflicts in the testimony, to weigh the evidence, and to draw *reasonable* inferences from basic facts to ultimate facts.

Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis added). *Jackson* thus requires that the trier of fact need only resolve conflicts in the testimony concerning basic facts *fairly*, not beyond a reasonable doubt. Preliminary

inferences from basic facts need only be *reasonable*; they need not be compelled beyond a reasonable doubt.

Decisions of this Court on related issues were consistent with the conclusion that the standard applies only to the elements of the offense, not to basic facts or preliminary inferences. For example, it was clear that indictments need not specify which overt act, among several alleged alternatives, was the means by which a crime was committed. *See Andersen v. United States*, 170 U.S. 481 (1898). In addition, this Court had held that the Constitution permits the States to place the burden of proof of a fact on the defense *if* the fact does not constitute an element of the offense charged. *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Leland v. Oregon*, 343 U.S. 790 (1952).

Insofar as counsel has been able to determine, all lower courts to address this issue as of late 1990 had held that the *Winship* standard "does not operate upon each of the many subsidiary, evidentiary, incidental or subordinate facts, as distinguished from elements or ultimate facts, upon which the prosecution may collectively rely to establish a particular element of the crime beyond a reasonable doubt." *State v. McDonough*, 533 A.2d 857, 862 (Conn. 1987) (Callahan, J., concurring), *citing United States v. Viafara-Rodriguez*, 729 F.2d 912, 913 (2d Cir. 1984), *United States v. Valenti*, 134 F.2d 362, 364 (2d Cir.), *cert. denied*, 319 U.S. 761 (1943); *United States v. Beechum*, 582 F.2d 898, 913 n.16 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979); *Frick v. State*, 6 S.W.2d 514 (Ark. 1928); *People v. Klinkenberg*, 204 P.2d 47 (Cal. App. 1949); *State v. Raine*, 477 P.2d 104 (Id. 1970); *Burris v. State*, 465 N.E.2d 171, 186 (Ind. 1984); *State v. Davis*, 212 S.E.2d 516 (N.C. App.

1975); *State v. Barry*, 34 A.2d 661, 663 (N.H. 1943). *Accord*, *United States v. Schwab*, 886 F.2d 509, 511 (2d Cir. 1989); *Gariepy v. United States*, 189 F.2d 459, 462 (6th Cir. 1951); *People v. Eddy*, 268 P.2d 47, 52 (Cal. App. 1954); *State v. Nelson*, 175 A.2d 814, 820 (N.H. 1961).

Although the Fourth Circuit's decision purported to apply *Winship* and *Jackson*, both of which existed at the time respondent's conviction became final, no controlling precedent at that time compelled a conclusion that the *Winship-Jackson* standard applied to basic facts and preliminary inferences as well as ultimate facts. The method of application of the beyond-a-reasonable-doubt standard adopted by the Fourth Circuit thus was not *dictated* by *Winship* or *Jackson* within the meaning of *Teague*. *See Caspari*, 114 S. Ct. 948; *Butler*, 494 U.S. 407. The Fourth Circuit's extension of *Winship* and *Jackson* in this case was, at the very least, one "over which reasonable jurists [could] disagree," *Sawyer v. Smith*, 497 U.S. 227, 234 (1990), as demonstrated by the contrary opinions of three other Federal Circuits and seven States.

The Fourth Circuit's method of application therefore cannot be applied to vacate respondent's conviction in a § 2254 proceeding unless it fits within one of the two exceptions recognized in *Teague*. The first exception, involving rules which place "certain kinds of primary, individual conduct beyond the power of the criminal lawmaking authority to proscribe," *Teague*, 489 U.S. at 311, *quoting Mackey v. United States*, 401 U.S. 667, 692 (1969) (separate opinion of Harlan, J.), obviously is not applicable.

The second exception allows Federal courts on habeas review of State criminal judgments to announce " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495, *quoting Teague*, 489 U.S. at 311. This Court has expressed doubt that many such rules have yet to emerge, *Teague*, 489 U.S. at 313, and the Fourth Circuit's rule in this case is not one of them. "[I]t has none of the primacy and centrality," *Saffle*, 494 U.S. at 495, of rules such as that adopted in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Saffle*, 494 U.S. at 495, *Teague*, 489 U.S. at 311, *quoting Mackey*, 401 U.S. at 693-94 (separate opinion of Harlan, J.). To meet this exception, a new rule must be one "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. The rule must not merely *affect*, but *"significantly improve"* the fact-finding process. 489 U.S. at 312 (emphasis added).

Adoption of the Fourth Circuit's version of the beyond-a-reasonable-doubt standard would impair rather than enhance the fact-finding process. To paraphrase Justice Scalia's apt hypothetical posed to support a related conclusion:

> When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because . . . [the evidence does not establish beyond a reasonable doubt whether] he strangled her to death (and caused the fire accidentally in his hasty escape), [or whether] . . . he left her unconscious and set the fire to kill her.

Schad v. Arizona, 111 S. Ct. 2491, 2506 (1991) (Scalia, J., concurring in part and concurring in the judgment). The results of the Fourth Circuit's rule may be equally absurd when it is applied in the context of cases, like the instant one, which involve purely circumstantial evidence and an issue of identity, rather than means.[5]

"[T]o consider otherwise innocent circumstances in isolation and conclude that each circumstance standing alone proves nothing concerning [a defendant's] guilt . . . denies reality. Circumstances doe not exist in isolation of one another but exist together with every other proven

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[5] For example, suppose the prosecution in this case had presented all the same evidence, but in addition had proven that a broken crystal bud vase was found in the victim's clenched hand; that traces of blood found on the vase were of a type inconsistent with the victim's but consistent with the blood of the defendant, as well as approximately sixteen percent of the population, but which for technical reasons could not be subjected to DNA analysis; that an unexplained cut was found on the defendant's person; and that, imbedded in the cut and in his clothing adjacent to the wound were particles of crystal which were identical in color, density, and optical properties to the crystal found in the broken vase. Under the Fourth Circuit's logic, because the prosecution could not prove individually beyond a reasonable doubt the inference that the blood on the vase was that of the defendant, or the inference that the glass particles found on the defendant's person came from the vase, the additional facts would *add nothing at all to the strength of the prosecution's case.* In short, the Fourth Circuit's rule would eliminate reliance on entire categories of circumstantial evidence which common sense tells us can be highly probative when considered in context, but which cannot independently be proven beyond a reasonable doubt because they establish only group characteristics or probabilities rather than individual characteristics.

fact and circumstance in the case." *Hughes v. Commonwealth*, ___ Va. App. ___, ___, ___ S.E.2d ___, ___ (June 21, 1994) (on rehearing en banc). It must thus be concluded that the Fourth Circuit's rule does not come within the second *Teague* exception, and that the Court of Appeals erred in applying this new rule in federal habeas corpus review of respondent's conviction.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE COURT OF APPEALS' UNAUTHORIZED EXTENSION OF THE *JACKSON V. VIRGINIA* STANDARD.

As previously discussed,[6] the Fourth Circuit's requirement that basic facts and preliminary inferences be proven individually beyond a reasonable doubt is fundamentally inconsistent with the commands of *Jackson*.[7] This requirement gives virtually *no* "play to the

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[6] See pp. 16-17 of this petition.

[7] Cases decided since respondent's conviction became final continue to support this conclusion. Only last term this Court again described the *Winship* standard as requiring the government to "prove beyond a reasonable doubt every *element* of the charged offense." *Victor v. Nebraska*, 114 S. Ct. 1239, 1242 (1994) (emphasis added). In *Estelle v. McGuire*, 112 S. Ct. 475 (1991), this Court likewise held that "The prosecution must prove all the *elements* of a criminal offense beyond a reasonable doubt," 112 S. Ct. at 480 (emphasis added), and sustained a jury instruction which permitted the jury to consider battered child syndrome evidence as proof that the defendant had caused the injuries resulting in the infant victim's death *if* the jury believed he had caused her prior injuries. In doing so, this Court commented that, "[t]o the extent that the jury may have believed McGuire committed the prior acts and used that as a factor in its

responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. *Jackson* commands that:

> a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences *must* presume – even if it does not affirmatively appear in the record – that the trier of fact resolved *any* such conflicts in favor of the prosecution, and *must* defer to that resolution.

443 U.S. at 326 (emphasis added). Based upon its insistence that each fact or inference be proven beyond a reasonable doubt, the Fourth Circuit simply refused to accord such deference to the conclusions of the jury.[8]

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deliberation, we observe that there was sufficient evidence to sustain such a jury finding *by a preponderance of the evidence.*" 112 S. Ct. at 483 (emphasis added) (citing cases dealing with preliminary findings of fact concerning prior crimes evidence). On a related subject, this Court has recently held that jury verdicts must resolve only the ultimate facts constituting the elements of an offense, and need not address individual historical facts or preliminary inferences. *Schad*, 111 S. Ct. 2491. Reported opinions from the lower courts other than the Fourth Circuit continue to hold that the beyond-a-reasonable-doubt standard applies only to the ultimate facts constituting elements of the offense, not to basic facts and preliminary inferences upon with the prosecution builds its case. *See United States v. Corgain*, 5 F.3d 5, 10 (1st Cir. 1993); *People v. Bryant*, 609 N.E.2d 910, 919 (Ill. App. 1993); *Commonwealth v. Truong*, 615 N.E.2d 208, 212 (Mass. App. 1993); *State v. Carroll*, 401 S.E.2d 114, 116 (N.C. App. 1991).

[8] Indeed, the Court of Appeals not only reweighed the evidence, but did so by the crude expedient of counting heads among witnesses: "More witnesses stated that [Evans-Smith] had arrived at the normal time than stated that he had been late, thus corroborating Evans-Smith's own statements." (A. 12, n. 11).

As a result, the Fourth Circuit disregarded the strong evidence connecting Evans-Smith with the crime and the evidence of his conduct indicating a consciousness of guilt, and disregarded the significance of the evidence considered as a whole.

Evidence Connecting Respondent with the Crime

Although the Court of Appeals conceded that the evidence adequately established that the scene had been staged, it disregarded the significance of this staging because it concluded that no evidence connected Evans-Smith with the crime. (A. 23 n. 20 and 21). The latter conclusion was a direct result of that Court's refusal to consider basic facts and primary inferences connecting Evans-Smith with the crime because it deemed them not to have been proven beyond a reasonable doubt:

1. The Court of Appeals ignored the fact that Dr. Hocker did not merely testify that the victim "died sometime between 4:00 and 8:00 a.m." (A. 4); he calculated that her death had occurred *at* approximately 6:00 a.m. Notwithstanding his concession that his method of calculation could err as much as two hours in either direction, implicit in the doctor's testimony was that 6:00 was the most likely time of death within that period. His implicit opinion that the method of calculation was reliable enough to be used was adequate reason for the jury to believe that his estimate was probably approximately right rather than substantially wrong. Because the *petitioner himself* told the police he did not leave the house until 6:20 or 6:25, the jury could clearly have inferred that he

was present at the time of his wife's death. Nevertheless, the Court of Appeals disregarded this evidence, concluding that the 6:00 time of death had not been proven beyond a reasonable doubt.

2. The fact that Evans-Smith arrived at work later than was his usual custom was important in the proof of his guilt. Nevertheless, the Court Appeals not only disregarded this evidence because it did not in itself prove him guilty beyond a reasonable doubt (A. 12, n. 11), but ***disbelieved*** the testimony which proved his lateness because the Court found other testimony in the record which it interpreted (wrongly) as contradicting his testimony (A. 12 n. 11; A. 26 n. 27), and ultimately concluded that alternative inferences could be drawn from the evidence: " . . . the medical examiner's estimate would still allow for the victim's being killed in his absence." (A. 27 n. 28).

3. Although one medical doctor testified that in his opinion the scratches on respondent's arm could have been caused by human fingernails such as the victim's, the Court of Appeals evidently disregarded this basic fact as not having been proven beyond a reasonable doubt because two other experts voiced opinions that the scratches could not have been caused by the victim's fingernails. (A. 13-14).

4. The Court of Appeals disregarded the evidence by which the jury could reasonably have concluded that the unconscious victim had been dragged from the kitchen up the

stairs to the bedroom because in its judgment this preliminary inference had not been proven beyond a reasonable doubt. (A. 21 n. 18). Consequently, the Court failed to credit the inference that the attack began at the kitchen table, or recognize the extreme unlikelihood that an unknown intruder would have been able to confine the victim's dog and surprise her at the kitchen table.

5. Although the jury could have inferred, from the hasty and poorly-conceived way in which the scene had been staged, that the crime was unplanned and thus had been committed in a sudden heat of passion, the Court of Appeals evidently concluded that this intermediate inference had not been proven beyond a reasonable doubt, because it opined that, "[n]o evidence of . . . heat of passion was introduced at trial." (A. 18).

6. The Court of Appeals' ultimate conclusion that there was no evidence to link the respondent to the crime caused it to disregard his conduct which bespoke a consciousness of guilt. (A. 24 n. 23).

Respondent's Conduct Bespeaking a Consciousness of Guilt

An additional reason why the Court of Appeals disregarded evidence from which respondent's consciousness of guilt could be inferred was because it judged the preliminary inferences not to have been proven beyond a reasonable doubt:

1. While recognizing the inferences that respondent's phone call to New Mexico was

an attempt to pressure his colleague into giving a favorable account of the time Evans-Smith arrived at work, and that this attempt was motivated by his consciousness of guilt, the Court of Appeals disregarded the latter inference because, in its judgment, "the first inference *might* lead" to an alternative conclusion that respondent had pressured his colleague to change his story to the police even though respondent was innocent. (A. 25 n. 25; A. 16).

2. Because the Court of Appeals concluded that it had not been proven beyond a reasonable doubt that Evans-Smith had arrived at work late, the Court refused to attach any significance to respondent's contradictory explanations for his lateness. (A. 24 n. 24).

3. The jury could infer that respondent's unusual comments to the police when first informed of his wife's death were calculated to highlight the arrangement of the scene to simulate a sexual assault. This incriminating inference, however, was disregarded by the Court for the express reason that the Court perceived no evidence linking respondent to the crime (A. 24 n. 23), and also because the Court chose to draw the alternative conclusion that "such questions might reasonably be expected." (A. 12).

The Significance of the Evidence as a Whole

The natural result of the Fourth Circuit's requirement that basic facts and preliminary inferences each be proven individually and independently beyond a reasonable doubt was that the Court failed to appreciate the

collective significance of the facts which, when separately considered, might appear inconclusive, but when considered as a whole, were mutually corroborative. "Pieces of evidence must be viewed not in isolation but in conjunction." *United States v. Maldonado-Rivera*, 922 F.2d 934, 978 (2d Cir. 1990).

Under a proper *Jackson* analysis, any reviewing court would conclude, as the District Court concluded (A. 80) that the jury could reasonably infer that, because the murderer sought to divert the suspicions of the police by staging the scene to look as if the crime had been committed by an intruder bent on rape and robbery, the crime was actually committed by someone who feared he would be an obvious suspect, and that, of the very small universe of people circumscribed by this inference, only Evans-Smith reasonably could be inferred to have been present at the time of the victim's death. Stated differently, the jury reasonably could conclude that an unknown intruder would not stage the scene to look as if the victim had been murdered by an unknown intruder, and could not have confined the victim's dog in the laundry room and surprised her at the kitchen table. The jury could infer respondent's guilt beyond a reasonable doubt from the extreme improbability of the coincidence that an *innocent* husband would have:

(1) admittedly left the house in which he was alone with his wife at a time which was at least 20 minutes later than the time the medical examiner estimated as her probable time of death;

(2) admittedly arrived at work at a time which was from 15 minutes to an hour later than

when a close associate at work fixed his normal arrival time;

(3) given inconsistent statements to various persons on different occasions concerning errands he had run on the way to work and concerning where his wife was when he last saw her alive;

(4) attempted to pressure a colleague to change his statement to the police to render a more favorable account of when the husband arrived at work;

(5) displayed fresh scratches on his arm which were described by the only medical doctor to have seen them as consistent with scratches caused by human fingernails and inconsistent with the cause to which the defense attributed them;

(6) displayed no shock or tears when first informed by the police of the sudden, violent death of his wife of 43 years, but rather asked questions apparently calculated to highlight and document the appearance of the staged crime scene, and displayed no tears when first embracing his daughter after her mother's death.

"[T]he beyond a reasonable doubt standard is itself probabilistic." *Victor*, 114 S. Ct. at 1247. The probabilities in this case were clearly sufficient to justify the jury's verdict, and the judgment of the Court of Appeals to the contrary was a direct result of its improper method of applying the *Winship-Jackson* standard. Its published opinion applying this analysis is in conflict with the opinions cited above from the First, Second, Fifth, and Sixth Circuits and from nine States. Moreover, because

the countless daily applications of the *Winship* standard occur not only in the published opinions of appellate courts, but in unpublished opinions of appellate and trial courts, and in unwritten decisions of trial courts, from which the prosecution in many jurisdictions has no right of appeal, it is impossible for this Court to know how many other courts are applying or will apply the same analysis used by the Fourth Circuit. It is thus extremely important to the administration of justice that this Court grant certiorari to undo the Fourth Circuit's distortion of the *Winship-Jackson* standard.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should summarily reverse the decision of the Court of Appeals.

Respectfully submitted,

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July, 1994

**Counsel of record*

No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN B. TAYLOR, WARDEN, STAUNTON CORRECTIONAL CENTER,

Petitioner,

v.

WILLIAM EVANS-SMITH,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

WILLIAM EVANS-SMITH, *Petitioner-Appellant,* v. JOHN B. TAYLOR, *Respondent-Appellee.*	No. 92-6347

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.

(CA-91-1547-AM)

Argued: December 9, 1993

Decided: March 21, 1994

Before HALL, PHILLIPS, and MURNAGHAN,
Circuit Judges.

Reversed and remanded by published opinion. Judge Murnaghan wrote the opinion, in which Judge Hall and Judge Phillips joined.

COUNSEL

ARGUED: Gerald Thomas Zerkin, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia, for Appellant. John H. McLees, Jr., Assistant Attorney General, Richmond, Virginia, for Appellee. **ON BRIEF:** Robert Godfrey, Kristine H. Smith, GERALD T. ZERKIN & ASSOCIATES,

Richmond, Virginia, for Appellant. Stephen D. Rosenthal, Attorney General of Virginia, Richmond, Virginia, for Appellee.

OPINION

MURNAGHAN, Circuit Judge:

Appellant, William Evans-Smith, is serving a twenty-year sentence at Virginia's Staunton Correctional Center for the 1985 murder of his wife, Barbara Evans-Smith. He was first convicted after a jury trial and sentenced to five years imprisonment in August 1985. That conviction was overturned on appeal to the Virginia Court of Appeals on the ground that much of the evidence used to obtain the conviction was either improperly admitted hearsay evidence or evidence that was more prejudicial than probative.

A second trial was set and Evans-Smith moved for a change of venue on account of pretrial publicity; his motion was denied after an extensive hearing. During the course of the second trial, which began on April 17, 1989, nearly four years after the first trial, Evans-Smith filed a Motion to Strike, arguing that the solely circumstantial nature of the evidence presented by the Commonwealth was insufficient to establish guilt. His motion was denied. The jury found Evans-Smith guilty of second-degree murder and recommended the maximum twenty-year sentence. Evans-Smith then moved to set aside the verdict, again arguing that the evidence was insufficient, and also arguing, among other grounds, that the court's prior denial of the motion to change venue deprived him of a

fair trial. He also moved for a new trial based upon alleged juror misconduct. Both motions were denied. Bond was denied, and Evans-Smith was sentenced to twenty years imprisonment.

Evans-Smith appealed through the state system. His appeals were denied. He next filed a state habeas petition, raising only the speedy trial issue. The denial of that petition was affirmed by the Virginia Supreme Court.

The present action is a § 2254 habeas appeal. In the district court, both the Commonwealth and Evans-Smith moved for summary judgment. After a hearing, the district court granted the Commonwealth's motion and denied Evans-Smith's. Evans-Smith appeals the summary judgment entered by the district court on the grounds that the evidence was insufficient to prove his guilt, that his sentence of twenty years following the second trial violated the rule announced in *North Carolina v. Pearce*, 395 U.S. 711 (1969), and that the jury that convicted him was tainted by pretrial publicity.

FACTS

In obtaining Evans-Smith's conviction, the Commonwealth proceeded on the theory that Evans-Smith killed or rendered his wife unconscious in the kitchen of their farmhouse, then dragged her body upstairs and staged a rape/robbery scene before leaving for work. Evans-Smith asserted throughout that he is innocent, that the murder was committed by an unidentified third party or parties, and that the Commonwealth failed to investigate properly the possibility that someone other than Evans-Smith was the murderer.

The prosecution agrees that the evidence used to convict Evans-Smith was entirely circumstantial. According to Loudoun County Medical Examiner Dr. Hocker, Barbara Evans-Smith (hereinafter "the victim") died sometime between 4:00 and 8:00 a.m. on the morning of April 15, 1985. His calculation was based on the degree of rigor mortis (60%) he observed upon his arrival at the crime scene at approximately 1:00 p.m. that afternoon. Dr. Byer, the medical examiner who performed the autopsy, determined that the victim died by strangulation thirty to sixty minutes after eating. The contents of the victim's stomach were consistent with the breakfast that Evans-Smith stated he had shared with his wife.

The victim's body was found in her second-floor bedroom of the couple's Loudoun County farmhouse with a pair of pantyhose wrapped three times around her neck and knotted. She was clad in a nightshirt and robe which had been ripped open, leaving her bare from the waist down. While the condition of her clothing suggested the possibility of a sexual assault, Dr. Byer found no seminal fluid or genital abrasions on the victim. There was a small amount of unexplained blood in her vaginal cavity. A pair of white underwear had been stuffed into the victim's mouth. Dr. Byer stated that the underwear was loosely packed, a fact which could lead to the inference that the underwear had been placed in the mouth after death, since the loose packing would not have served as an effective gag. The Commonwealth urged the jury to consider the underwear as evidence that the murder had been staged as a sexual assault.

Dr. Byer identified internal injury and hemorrhaging to the back of the victim's head which could have been

caused by her head hitting the wooden stairs, as she was dragged to the second floor. The doctor testified, however, that "any blunt force trauma" could have caused the injury. He also noted triangular-shaped abrasions on the victim's neck near her jaw line, which he believed were the victim's fingernail scratches, created while she was trying to remove the ligature from around her neck. There was no blood on the hands of the victim.

The bedroom in which the victim was found looked as if it had been ransacked, with items from the closets and dresser drawers strewn around the room. Evans-Smith's bedroom, separated from the victim's bedroom by a shared bathroom, had a similar appearance, but the rest of the house was in order, with the exception of an overturned, downstairs hall table and slightly skewed furniture in the kitchen. The Commonwealth argued that since only a few pieces of furniture had been moved, and many valuables were left either untouched or "neatly" laid out on the beds upstairs, the crime scene was consistent with a staged crime and not a real robbery.

Evans-Smith's daughter, Leslie Cook, noted in testifying for the prosecution that the front door was ajar when she arrived at the scene at approximately 11:00 a.m., that one of the two dogs was closed up in the laundry room, and that the other was outside. Cook also testified that she observed one set of tire tracks on the newly raked gravel driveway as she came onto the property.

She and another prosecution witness, William Laycock, testified to the presence of another set of tire tracks running across the hayfield toward a second exit on the

morning in question. This second set of tracks was not investigated by the police, and the defense argued at trial that their existence implied that someone other than Evans-Smith had been to the house that morning.[1]

Special Agent Ritchie of the Virginia State Police, a key participant in the investigation of the crime scene, placed bags over the victim's hands and feet upon his arrival to preserve any evidence on them during transport, and collected several other items from the crime scene for analysis, including jewelry boxes which had been tampered with and which Ritchie believed could be fingerprinted.[2] No fingerprints were taken from the furniture and the other items that were found out of place on the first floor. Nor was fingerprinting undertaken along the staircase. Ritchie also observed two parallel scratch marks, which were photographed, on the linoleum floor in the kitchen. Although the Commonwealth attempted to cite these scratch marks as evidence that the victim was killed in the kitchen, then dragged across the floor and upstairs, State Police Special Agent Schultze, testifying for the prosecution, stated that the scratch marks could not have been caused by the soft slippers the victim was apparently wearing at the approximate time of the murder. Her slippers were found in different rooms on the first floor. At oral argument, the Commonwealth

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[1] Under cross-examination, Laycock, a friend of Cook and an early arrival on the crime scene, stated that it would have been unlikely that Evans-Smith, a farmer, would have driven through this particular field, as such a path would have damaged his crops.

[2] The results of the fingerprint analysis are not indicated in the record, and neither party makes mention of them.

asserted that its argument was that the victim's bare heels had created the marks.

Among the evidence collected by Ritchie were seventy-three individual hair samples from around and on the body of the victim and from the stairway leading to the second floor, tissues removed from the wastebasket in the shared bathroom, the victim's nightshirt and robe, and various other items.

Of the fourteen hair samples taken from the stairway, Forensic Scientist Deanna Dabbs found ten of them to be unidentifiable, three to be consistent with the hair of the victim (one of which had been forcibly removed), and one blond head hair to belong to neither the victim nor to Evans-Smith. Thirty-nine of the fifty-nine hair samples taken from the victim's body or bedroom were found to be consistent with the victim's hair, seven were unidentifiable, and seven were consistent with the hair of Evans-Smith. None of the hair attributed to Evans-Smith had been forcibly removed. Of the remaining hair, one brown caucasian head hair taken from the bag enclosing the victim's clenched left hand was found to belong to neither the victim nor to Evans-Smith.[3] Five hair samples

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[3] Whether this hair was found in the closed hand or simply in the bag is disputed. Not disputed is that the bagging technique is used to preserve the evidence. The person responsible for bagging the victim's hands testified that the purpose was to preserve evidence and that he did his job properly. While the Commonwealth argued to the jury that the hair probably came from one of the investigators on the murder scene (an admission that their investigative procedures were flawed), *no* effort was made to match the hair found in the evidence bag with that of any of the investigators on the scene.

taken from a pubic combing of the victim were definitely not Evans-Smith's, and could not be identified as belonging to the victim.[4]

Dabbs analyzed several small blood stains on the victim's robe and a blood-stained tissue from the shared bathroom's wastebasket. There was also a band-aid found in the wastebasket with an amount of blood on it too minute to test. Two of seven blood stains on the robe were consistent with the same type as Evans-Smith's blood.[5] Blood of the same type as Evans-Smith's was also found on a tissue retrieved from a wastebasket in the shared bathroom.

Evans-Smith told the police that he and his wife had cleared limbs, thorny locusts, and other brush from parts of their farm on the Saturday and Sunday morning preceding Monday's murder.[6] Commonweaith witnesses corroborated this statement. While clearing the brush, Evans-Smith allegedly acquired several scratches on his arm and hands. At about noon on Sunday, after patching up his scratches with large band-aids, Evans-Smith and his wife attended the Oatland Point-to-Point horse race. Upon their return that afternoon, Evans-Smith raked the gravel driveway with a york rake.

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[4] Hair samples sometimes may be identified as belonging to a specific person, sometimes a specific person may be ruled out as the source of the hair, and sometimes the test simply cannot determine whether the hair belongs to a specific person or not.

[5] Dabbs, a prosecution witness, testified that the blood was not only consistent with Evans-Smiths', but also with that of 58% of the population.

[6] Evans-Smith did not testify in the second trial, although he did in the first.

Evans-Smith stated to investigators that he arose on the morning of the murder at 5:00 a.m., as usual, and drove down the one-quarter mile lane to the mailbox to retrieve the newspaper.[7] While at the mailbox, Evans-Smith claimed, he caught a glimpse of a dark-colored van parked on the road near a neighbor's driveway, but thought nothing of it.[8] He returned to the house, placed the newspaper on the hood of his wife's truck – as was

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[7] Evidence was introduced that it was Evans-Smith's habit to walk down the driveway to pick up the newspaper, but that sometimes he drove. Apparently, the prosecution hoped to show that he had in fact walked, not driven, down the driveway to get the paper. His having walked would make consistent evidence from his daughter that there was but one set of tire tracks on the drive, and call into question Evans-Smith's statements concerning his sighting of the dark-colored van. *See infra*, text at note 8.

The testimonial evidence as to the tire tracks was disputed by the defense, which asserted that the york rake itself necessarily would have created a set of tracks, making it impossible for there to have been only one set. In addition, evidence was submitted to the effect that the driveway was narrow, and that it was common that one car would follow the tracks of another.

[8] The prosecution called a number of witnesses who testified that they had driven on the road in question on the same morning and had never seen a dark colored van. None of these witnesses had driven past the point where Evans-Smith said he saw the van within fifteen minutes of either side of the alleged sighting. A witness for the defense testified that she had seen a green van with Louisiana plates speeding through the area. The van had cut her off, and had acted strangely enough that she reported it to the police. Patricia Packard, who lived opposite the entrance to Evans-Smith's driveway, testified that she remembered hearing and seeing a dark-colored vehicle hurriedly departing the Evans-Smith driveway the morning of the murder between 9:00 and 11:00 a.m.

their custom – and completed some farm chores. Evans-Smith stated that he returned to the house to breakfast with his wife at approximately 6:00 a.m., and after signing a birthday card for their son-in-law at his wife's request, kissing his wife goodbye in the kitchen, and watching her wave to him from her upstairs bedroom,[9] he began his one and one-half to two hour commute to American University's Foreign Area Studies Office in Washington, D.C.[10] According to Evans-Smith, the traffic coming into the city was "extremely slow" that morning. The prosecution put on witnesses who testified that there had been nothing extraordinary, such as accidents, about the traffic that morning. The Commonwealth argued that Evans-Smith complained "bitterly" about the traffic, and that his reaction was inconsistent with the normal state of rush hour traffic.

The trial transcript suggests that Evans-Smith did complain, but perhaps not "bitterly." The testimony of a co-worker was that

> [Our conversation] was concerned with the traffic that morning, that it was exceptionally bad.

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[9] The prosecution presented evidence that Evans-Smith had been inconsistent, telling at least one person that his wife had waved to him not from upstairs, but from the kitchen window – both were on the same side of the house. This contradiction typifies the sort of attenuated evidence on which the prosecution relied in asserting that Evans-Smith concocted a story about the circumstances of that morning.

[10] No evidence was submitted by the Commonwealth as to the time Evans-Smith's commute customarily took. Nor was any evidence submitted demonstrating that the time Evans-Smith said it took to travel the distance on the day of the murder was implausible.

> The traffic was very often bad coming over the Cabin John Bridge and it was exceptionally bad that morning, yeah.
>
> And Mr. Evans-Smith was upset . . . in a way that is not abnormal with the traffic.

Two investigators who interviewed Evans-Smith two days after the murder testified that Evans-Smith told them at that time he had not made any stops on his way to work. He later told someone else and testified at the first trial that he had stopped at the university president's office to drop off some books. The office, however, was closed, and he proceeded on to work. According to prosecution witness Mimi Tandler, who was writing a book on the case, Evans-Smith told her *after the first trial* that he had stopped at a car wash on the way to work.

Evans-Smith stated that he arrived at his office at approximately 8:15 a.m. or "some time before 8:30 a.m." Evans-Smith's co-worker, Dorothy Lohman, testified that Evans-Smith usually arrived at work between 7:30 or 8:00 a.m., but that he was not at his desk at 8:45 a.m. when she went to his office. She had a meeting with Evans-Smith concerning edits of a manuscript later that morning, however, at which time he appeared completely normal. Prosecution witness and coworker James Rudolph testified that the office arrival time was flexible and that it was normal for people to arrive between 8:00 and 8:30 a.m. He further testified that he had spoken with Evans-Smith in the office parking lot at 8:30 or 8:35 on the morning in question. This conversation was the source of the comments about the traffic. A defense witness stated that Evans-Smith arrived at work on April 15 between 8:00 and 8:30 a.m. Yet another stated that he had spoken with

Evans-Smith in the men's bathroom on the same floor as Evans-Smith's office at 8:30 a.m.[11]

Evans-Smith was contacted by the police at his office and told of the murder that afternoon. Lieutenant Brown and Investigator Merchant testified that Evans-Smith then asked a series of questions about whether his wife had been raped or disfigured, whether she was clothed or not, where she was located, and who found her. Although such questions might reasonably be expected, the prosecution argued that such questions suggested he knew what the murder scene looked like, and, in any event, were odd reactions for someone told of the murder of his wife. Brown testified that as soon as he told Evans-Smith

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[11] The dispute over the time of Evans-Smith's arrival provides a useful illustration of the quality of the evidence in this case. The prosecution argued that the "inconsistency" in the statements about when he arrived, combined with an arrival time which, according to one witness, was later than usual, suggests that Evans-Smith was otherwise engaged that morning, and that he had lied about his whereabouts. Our task emphatically is not to reweigh the evidence; however, even viewing the evidence in a light most favorable to the prosecution, it is difficult, if not impossible, to determine why his arrival time, which at the most was only somewhat later than usual, indicates anything about Evans-Smith's activities that morning. Anyone with a daily commute of up to two hours in rush hour traffic could reasonably be expected to arrive late. Such lateness of itself is not proof of a crime beyond a reasonable doubt. Moreover, more witnesses stated that he had arrived at the normal time than stated that he had been late, thus corroborating Evans-Smith's own statements. Indeed, the witness who said that Evans-Smith had been late (*i.e.*, later than 8:45) based her conclusion on her *not* having seen Evans-Smith in his office, while the witnesses who testified that he was there by about 8:30 actually saw him.

that a burglary had occurred, Evans-Smith gasped, "Oh my God, the van," and then provided a description of the van, as noted above.

The investigators and Evans-Smith then left Washington for Loudoun County. The investigators, who trailed him on the way back, testified that Evans-Smith, upon reaching stop lights, would put his head in his hands or, alternatively, look in his rear view mirror.

When they reached the farm in Loudoun County, Evans-Smith was not allowed to visit the crime scene to see his wife's body. He engaged in a physical tussle with the authorities, during which they first observed several scratches on his arms.[12] The scratches on his arms were the source of much testimony at the trial. The prosecution's theory was that the scratches were caused by the victim's fingernails in the course of a violent struggle with Evans-Smith. The Commonwealth based its argument on the testimony of its witness, Dr. Solin, who had examined Evans-Smith's scratches and had determined

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[12] The defense argued to the jury that the Commonwealth's refusal to allow Evans-Smith to see the body, combined with its refusal to investigate any alternative theories and its insufficient fingerprinting, suggested that the authorities already considered him a suspect, especially since other individuals had been allowed on the scene. The Commonwealth argued that when Evans-Smith was invited to view the body several days later and after the autopsy, he refused, demonstrating that the tussle in front of his house was not genuine, but merely a performance. Yet, if he had shown indifference in seeing his wife's body at the first possible moment and then sought to see the body several days later, the prosecution would no doubt have instanced the scenario as proof of murder.

that they could have been caused by the victim's fingernails. He testified that his knowledge of the fingernails was based on Commonwealth photographs. Dr. Solin did not himself examine the victim's fingernails. Two other prosecution witnesses, who saw only photographs of Evans-Smith's scratches but had made a careful inspection of the victim's fingernails, concluded that her fingernails could *not* possibly have caused the scratches. These two witnesses, Loudoun Medical Examiner George T. Hocker and Virginia Deputy Chief Medical Examiner Dr. James C. Byer, both testified that the victim's fingernails were too short and dull to have made the scratches. They opined that the scratches were more likely made, as Evans-Smith claimed, by his work clearing thorn bushes.[13] Evans-Smith's daughter, who testified for the prosecution, stated that she had seen her parents clearing out thorn bushes the day before the murder. Moreover, the only debris found under the victim's fingernails was identified by the prosecution witnesses as having resulted from her attempts to release the ligature from around her neck. None of the debris was consistent with Evans-Smith's blood or skin; indeed, there was no blood on the victim's hands at all. Evans-Smith had stated that the blood found on the tissues and medicated band-aid in his bathroom had come from his and his wife's having

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[13] The Commonwealth attempted to refute this finding by putting on testimonial evidence that Evans-Smith ordinarily wore gloves when he worked on the farm. There was testimony, however, that he did not always wear gloves.

Several prosecution witnesses who had seen Evans-Smith at the Point-to-Point race the day before the murder testified that they had not seen any scratches or bandages the day of the race. Two defense witnesses testified that they had in fact seen bandages on his hands.

treated his scratches from the thorns. Prosecution witness, Dabbs, testified that the spots on the victim's robe might have been placed there at different times, one stain having been on the robe as long as eight weeks previously, and the other less than one month previously. The test was not capable of determining whether the blood had been placed on the victim's robe the day of the murder.

On the evening of the murder, after the day's investigation had concluded, Evans-Smith was asked by the authorities to make a list of any items he believed were missing from the house. Two days later Evans-Smith asked to speak with Investigators Brown and Merchant. During the ensuing interrogation, he mentioned that his wife kept her jewelry and hay money in an aqua jewelry box in her bedroom. Prosecution witness Joe Rogers, a farmer who leased and cultivated the land adjoining Evans-Smith's farm, testified that Evans-Smith had phoned him ostensibly to discuss that year's planting. During the course of the conversation, Evans-Smith asked him to keep an eye out for anything suspicious that he might find and report it. Shortly thereafter, an employee of Rogers, while discing the neighboring field, found the aqua box in the field, slightly covered by dirt. There were no fingerprints on the box, but its composition as well as the time it had been exposed to the elements made it unlikely that such fingerprints would still exist.

Several other facts bear mention. During the week following the murder, Evans-Smith called his coworker, Rudolph, who was then vacationing in New Mexico. During their conversation, Evans-Smith related that he had been indicted, and he believed the state had bungled the

investigation. He then related to Rudolph his activities on the morning of the murder, telling him of the stop at the president's office and his late arrival at the office. He seemed concerned, however, that Rudolph remembered his arrival time to be approximately 8:35, because he had already told the police that he thought he had arrived at work at 8:15 a.m. According to Rudolph, Evans-Smith mentioned that "it would be nice if he and I recalled the same time of arrival that morning." The Commonwealth argued that the conversation was evidence that Evans-Smith was trying to make other people's stories consistent with his own. Rudolph testified, however, that Evans-Smith did not threaten him, and that "he was not noticeably angry. I'm sure he was upset, everybody was upset." Rudolph testified that Evans-Smith was not angry with him. In addition, he testified further that his watch often ran five minutes fast, and that he could have seen Evans-Smith at 8:30 rather than at 8:35 a.m.

Evans-Smith attempted, with no success, to have the police investigate the possibility that two horse trainers, Robert Rivera and Rudy Ruiz, who were working at a horse barn on adjacent property at the approximate time of the murder, may have been involved in the crime. In support of this theory, Evans-Smith pointed to the fact that Rivera was on a $100,000 bond for drug charges and that he had been ruled off of the Charles Town race track, after drugging horses. There was some suggestion that Rivera's whereabouts on the morning of the murder were inconsistent with his statements at trial. The Rivera theory suffers from incomplete development in the record.

On the basis of the foregoing evidence, essentially all there is, William Evans-Smith was convicted of the second degree murder of his wife of over forty years.

DISCUSSION

The standard of review for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, *Goldsmith v. Witkowski*, 981 F.2d 697, 701 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 3020 (1993), and according the benefit of all reasonable inferences to the government, *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982), any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The standard is obviously rigorous. As the Supreme Court recently has reiterated, "the writ of habeas corpus has historically been regarded as an extraordinary remedy." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993). Nevertheless, however circumscribed, the writ remains a remedy, "a bulwark against convictions that violate fundamental fairness." *Id. (quoting Engle v. Issac*, 456 U.S. 107 (1982)) (internal quotation omitted).

The very existence of the *Jackson* test

> presupposes that juries accurately charged on the elements of a crime and on the strict burden of persuasion to which they must hold the prosecution, nevertheless "may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." [The test] was adopted to provide an additional safeguard against that possibility, and was to give added assurance that guilt

> should never be found except on a rationally supportable *"state of near certitude."*

West v. Wright, 931 F.2d 262, 268 (4th Cir. 1991), *rev'd on other grounds*, 112 S.Ct. 2482 (1992) (quoting *Jackson v. Virginia*, 443 U.S. at 315).

The question before us in the instant case, therefore, is whether the wholly circumstantial evidence, taken together, could allow any rational trier of fact to conclude *beyond a reasonable doubt* that Evans-Smith murdered his wife. In conducting such an inquiry we consider all the evidence presented in the record.

The prosecution's theory of the case was that Evans-Smith, the victim's husband, for whatever reason but probably in the heat of passion (of which there was no proof), murdered his wife or rendered her unconscious in the kitchen after the two had breakfast. No evidence of motive nor of heat of passion was introduced at trial. Indeed, the only evidence before the jury was that the Evans-Smiths had been seen the day before the murder enjoying one another's company. The prosecution's theory was that he then dragged his wife up the stairs, and placed her on the floor of her bedroom. Realizing, according to the prosecution, that he would be a primary suspect, Evans-Smith then supposedly staged a robbery/rape scene and drove to work, perhaps arriving a little later than usual. According to the Commonwealth, Evans-Smith's statements and behavior after the crime suggested to the prosecution an attempt to cast blame elsewhere, lending further supposed support to the conclusion that he in fact had committed the murder and then had attempted to cover it up.

A comprehensive review of the facts has been set out above, but, at the risk of repeating many of them, it seems worthwhile to explore fully the facts on which the Commonwealth particularly relies in its brief. They are quoted at length as follows:

1. When the victim's daughter arrived at the home that morning, she found one of her parents' two dogs, significantly the one which she described as more protective of the victim, penned up in the laundry room. The daughter had never seen the dog thus confined before.[14]

2. The victim, a 64-year-old woman, was found naked from the waist down, with her nightshirt torn open and a pair of panties placed in her mouth in a manner so as to suggest that they had been used as a gag. She was killed by strangulation with a ligature, consisting of a pair of pantyhose wrapped three times around the neck and knotted.[15] Her room was in disarray, with

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[14] The fact is meant to support an inference that, since Evans-Smith knew the dog's habits, Evans-Smith would know which of the two dogs he had to lock up to commit the crime. While we can give the prosecution the benefit of the inference that the dog was locked up because it was more protective of the victim on the day of the murder than the other dog, it is unclear why *any* attacker (Evans-Smith or someone else) would not have noticed the difference in protectiveness of the two dogs, if that difference were as great as the prosecution suggests.

[15] All parties assume that the pantyhose belonged to the victim. The Commonwealth asserted that they were particularly convenient to Evans-Smith, since he would have known their location. Another pair of pantyhose was found, in plain view, in a dish on top of the victim's dresser.

drawers pulled from dressers and various items from the closet placed on the floor. A button which matched her nightgown was found under the bed next to where she lay[,] establishing that the nightgown had been ripped open in the bedroom.[16]

3. The kitchen furniture was out of place, there were drag marks consistent with the victim's heels being dragged across the kitchen floor,[17] and a table was overturned in a hallway leading from the kitchen to the stairs to the victim's room. The autopsy revealed head injuries which could have been caused by the victim's head hitting the stairs as she was dragged from the kitchen, up the stairs to her room.[18]

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[16] The inference meant to be drawn here, particularly from the button, is that having been killed in the kitchen and dragged up the stairs, the victim's gown was torn open after she had been placed dead on the floor of her bedroom. The inference is somewhat remotely meant to support the theory of a staged rape.

[17] The statement that the marks were consistent with the victim's being dragged is simply unsupported by the record. Indeed, the record suggests that drag marks *could not* have been made by the heels being dragged. The prosecution's witness Schultz, a state crime scene technician, clearly stated that the slippers the victim apparently had been wearing could *not* have caused the drag marks on the linoleum floor. No evidence was adduced supporting the prosecution's assertion that the victim's bare heels, had she not been wearing slippers, caused the marks.

To the extent, therefore, that the Commonwealth's theory is helped by the murder having been committed in the kitchen, and the body having been dragged up the stairs, the marks do not appear to support such an inference.

[18] It is somewhat unclear as to whether the prosecution advanced the theory that Evans-Smith killed his wife in the

4. There was no evidence that the victim had been sexually molested in any way. There were no bruises, abrasions or tears on her

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kitchen and then dragged her upstairs, or whether he knocked her out in the kitchen, and then strangled her upstairs. In his closing argument, the Commonwealth's attorney suggested that he was advancing either theory, "The evidence is, I would submit, that she was either rendered unconscious at the table *or* strangled at the table and dragged upstairs." Plainly, the theory that she was "rendered unconscious" raises a difficult problem for the Commonwealth's theory that the victim's head was bruised as she was being dragged up the stairs. The record suggests that the victim's head suffered a defined internal contusion; even if the contusion represented more than one head injury (an inference not supported by the record), all of the injuries – those caused by being rendered unconscious and those caused by the stairs would have had to occur in the same part of the head. To say the least, this seems unlikely, and subject to reasonable doubt. If the victim's head did not hit the stairs and the skid marks on the kitchen floor were not caused by her slippers, there is *no* evidence that she was "dragged" upstairs. In order to remain consistent with the Commonwealth's theory, we would have to infer that Evans-Smith, a 64-year-old man in admittedly good shape, knocked out his wife and then carried or dragged her upstairs without doing any further damage to her body or any damage to the house. In that connection, it is worth noting that the victim's body was carried down the stairs by three medical technicians, one of whom noted that she was heavy.

Finally, the bruise on the victim's head could have been caused, according to the medical examiner, by any blow. The idea that the blow was caused by a step was inventively advanced by the prosecution to support the dragging theory. As stated before, there is no evidence that she was dragged, therefore there is no more evidence connecting the blow on the head to a step than there is connecting the blow to any other blunt object. What inference was there for the jury to draw beyond a reasonable doubt?

breasts or genitalia, nor was there any evidence of seminal fluid anywhere on her body, clothing or bedclothes.[19]

5. Dr. Hocker, the medical examiner who responded to the scene, testified without contradiction that the victim's body had been placed where it was found, and that she had not fallen dead there. His opinion on this was not questioned on cross-examination. It was stipulated that the testimony of Dr. Beyer (sic), the medical examiner who performed the autopsy, would be that the panties probably were placed in her mouth after she was strangled. Since there would be no need for a gag after the victim had been killed, both of these observations support the conclusion that the scene was "rigged" to look like something other than what it was.[20]

6. Other than the victim's room, the defendant's bedroom was the only other room in the house that showed any signs even vaguely consistent with a burglary. Two

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[19] There was at least a little blood in the victim's vagina. Obviously, sexual assaults frequently occur without physical trauma or evidence being left behind. Nevertheless, viewing the evidence in a light most favorable to the prosecution, it is plausible that involved was someone who wanted the crime scene to appear consistent with that of a sexual assault.

[20] The prosecution urges us to believe that the crime scene was staged. Even if a rational fact-finder would accept this theory, the Commonwealth's bald assertion that no one but Evans-Smith would have staged the crime scene simply is insufficient ground for us to conclude that a rational fact-finder could connect Evans-Smith beyond a reasonable doubt to the killing.

jewelry boxes had been emptied on the defendant's bed, but the photographs revealed that the contents had been spread neatly out on the bed, and items of obvious value were left in place. Silverware was left untouched in other rooms.[21]

7. There was no evidence that anyone other than the defendant had been in the home on the morning of the killing. There was no blood at the scene other than blood consistent with the victim and the defendant. Blood consistent with the defendant's blood was found on tissues in a waste-basket in the room where the victim's body was found.[22]

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21 There was testimony that a friend of the victim's had called the house and let the phone ring three times sometime after 8:00 a.m. The defense suggested that the repeated phone calls could have scared the intruders away before they completed the crime. While we note the defense's theory is not implausible, we must give the benefit of the inference to the prosecution. That inference suggests that someone staged the crime scene.

Even if we infer that the "staged" quality of the crime scene suggests a cover-up, there is nothing linking Evans-Smith to the crime, except for the unsubstantiated prosecution's theory that no one else could have had any reason to stage a rape and robbery.

22 While all inferences must be made in favor of the prosecution, leaps of logic should not be. Here, the Commonwealth asserts that the bloody tissues were left behind by Evans-Smith, who had used them to wipe scratches caused by a struggle with his wife, though prosecution evidence was to the effect that the victim could not have caused the scratches. Such careless littering by Evans-Smith would be, at the very least, somewhat inconsistent with the theory that he had killed his wife, and then had attempted to stage a robbery scene.

8. When informed of the fact that his 64-year-old wife had been killed, the defendant asked a series of considered objective questions which the jury could infer suggested his awareness of the appearance of the scene of the crime, and were calculated to highlight the staging of the scene to simulate a rape and robbery by an unknown intruder. Specifically, Evans-Smith asked if his wife had been raped, whether she was clothed or not, whether she had been disfigured, where she was, and who had found her.[23]

9. The defendant gave contradictory statements as to where his wife was when he last saw her, and gave contradictory statements as to whether he stopped on his way to work, claiming first that he made no stops at all, and later claiming to have stopped at the provost's office to deliver books, and finally claiming he stopped at a car wash.[24]

10. At one point he met with several friends in what the jury could infer was an effort to get them all to agree to his story about

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[23] The Commonwealth's inference that such comments suggest guilt would perhaps be supportable if there were anything linking Evans-Smith to the crime. Otherwise, the questions seem to be perfectly reasonable ones to be expected of a bereaved husband, and it is difficult to see how they are consistent with his guilt.

[24] These inconsistencies are treated at some length in the facts section. In our view, although they received much attention at trial, the contradictions appear inconsequential, since Evans-Smith appears to have arrived at work at about the usual time.

delivering books on the morning for the killing. He even went so far as to call one person in New Mexico in what the jury could infer was an effort to get that person to say he had arrived at work on the morning of the murder earlier than he did.[25]

11. He gave contradictory statements as to the location of a mysterious van he claimed to have seen when he claimed to have driven to the bottom of his driveway to retrieve the morning newspaper. Several people who had driven the road that morning at about the time the defendant claimed to have seen the van testified that there had been no such van present. The road was a narrow, two lane dirt road on which a van would be readily seen. The defendant claimed initially that he had driven to the bottom of his driveway to get his paper, that that was when he had seen the van.

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[25] We have searched the record in vain, paying particular attention to the passages cited by the prosecution, for support for the first sentence of the paragraph. The second is mentioned in the facts section. Once again, what is required here, in order to find for the Commonwealth, is a kind of double inference. We must infer that the content of Evans-Smith's phone conversation with someone in New Mexico was meant to make his colleague's story consistent with his own, and then we must infer that the reason he desired consistency was to create an alibi since he had committed the murder. However, the first inference might lead only to the conclusion that *whether or not* he had committed the murder, it would be in Evans-Smith's interest to present a consistent story to the police. After all, the recipient of the phone call testified that Evans-Smith simply said that it would be "nice" if the two of them had the same story. He did not appear angry, merely upset.

His daughter testified that when she arrived at the house, however, there was only one set of tire marks in the freshly raked driveway. Those tire marks would have been made by the defendant when he left to go to work.[26]

12. Dr. Byer testified that the autopsy revealed the victim died within thirty to sixty minutes of her last intake of food. The defendant told investigators that he ate breakfast with her at about 5:30 or 6:00 a.m. and that he left for work about half an hour later, at his usual time of 6:30 a.m. Coworkers testified that the defendant usually arrived at work between 7:30 and 8:00 a.m., but there was testimony that he was not at work until between 8:30 and 8:45 on the morning of the killing.[27]

13. Although the defendant had complained bitterly about traffic that morning when he spoke to others, there was testimony from several law enforcement officers that there were no unusual traffic tie-ups on the defendant's route that morning. There was no evidence adduced at trial to support the defendant's claim of unusual traffic congestion. This evidence placed the defendant

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[26] There was testimony tending to establish the presence of the van, and a track was shown across a cultivated field, indicating the presence on the scene of an unknown party or parties.

[27] The evidence shows that Evans-Smith could have been with his wife when she was killed. Only one prosecution witness testified that Evans-Smith was regularly at work between 7:30 and 8:00, and only one (the same one) testified that he was not at his desk at 8:45 a.m.

> with the victim during virtually all of the time frame in which the medical examiner fixed her death.[28]

At the outset, it is worth noting that circumstantial evidence need not exclude every reasonable hypothesis of innocence. *Stamper v. Muncie*, 944 F.2d 170, 174 (4th Cir. 1991). Rather "circumstances altogether inconclusive, if separately considered, may, by their number and joint operation . . . be sufficient to constitute conclusive proof." *Id.* (internal quotation marks and citations omitted).

Even allowing for this important *caveat*, we believe that a rational trier of fact could not determine that the evidence supports a finding of guilt *beyond a reasonable doubt*. Instead, what the evidence shows is that Evans-Smith was at his home the morning of the murder, a fact

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[28] The record suggests that Evans-Smith complained about the traffic, but it does not suggest that he did so "bitterly." Most of the evidence adduced at trial suggests that Evans-Smith arrived at work around 8:30 a.m. According to the medical examiner, the victim could have died anywhere from 30 to 60 minutes after she finished eating. Evans-Smith stated that he left for work after breakfast at 6:20 or 6:25, which would not have been inconsistent with his arrival time. The time of death would then have been anywhere from 7:00 to 7:30 a.m. Even assuming that he left at 7:00, and that the drive took the least amount of time it ever did, one hour and a half, the medical examiner's estimate would still allow for the victim's being killed in his absence.

We must not re-weigh the evidence, but it is worth illustrating that the victim could easily have been killed after Evans-Smith left. Indeed, the rigor mortis analysis allowed for the possibility that she was killed as late as 8:00 a.m. If she had continued breakfast after her husband's departure, the victim could have been killed at 8:00 a.m.

he does not dispute and would be his most customary behavior. In addition, according all reasonable inferences to the benefit of the prosecution,[29] we believe a rational trier of fact possibly could conclude beyond a reasonable doubt that the crime scene was staged. It is the next step – an inference that Evans-Smith was within "a state of near certitude" the perpetrator of this terrible crime – that the evidence simply cannot support.

"A determination in federal collateral review that a state court conviction by jury verdict was not supported by constitutionally sufficient evidence is one to be made with special caution and anxiety." *West v. Wright*, 931 F.2d at 270. As in *West*, the instant case requires not only the reversal of a federal district court, but also of the state trial and appellate courts.

We conclude, however, that the evidence assessed in its entirety and in the light most favorable to the prosecution is not sufficient to persuade any rational trier of fact of the petitioner's guilt beyond a reasonable doubt, that Evans-Smith's conviction on the evidence therefore violated his constitutional right to due process, and that he

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[29] It is essential to remember that *Jackson* requires that we review *all* the evidence and then determine whether a rational trier of fact could have found guilt beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319 ("*all of the evidence* is to be considered in the light most favorable to the prosecution") (emphasis in original). Favoring the prosecution with all inferences does not mean that we must ignore evidence that is in the record, but which they ignore. So, for example, as mentioned in the facts section, the unidentified hair taken from the evidence bag enclosing the victim's left hand as well as the unidentified hair from the pubic combing suggest a view of the events contrary to the one provided by the Commonwealth.

is entitled to the relief sought in this habeas corpus proceeding. Evans-Smith could no doubt have acted as the prosecution has contended he did. However, the suppositions are derived from acts of his consistent with a husband's perfectly proper behavior mixed with imaginations of behavior for which his presence has not been proven. To start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt that the defendant was guilty. The prosecution has attempted to accomplish only the first alternative, not the second. As the Supreme Court has long taught "[i]t is the duty of the Government to establish . . . guilt beyond a reasonable doubt." *In Re Winship*, 397 U.S. 358, 362 (1970) (quoting *Leland v. Oregon*, 343 U.S. 790, 802-803 (Frankfurter, J., dissenting)). Such guilt has not been established, and, as a consequence, Evans-Smith's right to due process has been violated.

We are unable to conclude that any rational trier of fact could have found Evans-Smith guilty beyond a reasonable doubt.[30] We therefore remand the proceeding to the district court with directions to issue the writ vacating Evans-Smith's conviction.

SO ORDERED

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[30] Having found the evidence insufficient to sustain the conviction, we have no need to reach the other grounds of appeal.

VIRGINIA: IN THE CIRCUIT COURT
OF LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA	:	CRIMINAL
vs.	:	NO. 4700
WILLIAM EVANS-SMITH	:	

ORDER

For the reasons stated in the opinion letter of this Court, dated July 21, 1989, it is hereby ORDERED that the defendant's *Motion To Set Aside the Verdict* and *Motion For A New Trial Based Upon Alleged Juror Misconduct* are denied.

It is further ORDERED that the defendant's Motion to have the Pre-Sentence Report, previously prepared by the Probation and Parole Office of this Court be up-dated and the up-date forwarded to the Court forthwith.

Let a copy of this Order be forwarded to the Commonwealth's Attorney's Office, defense counsel and the Probation and Parole Office.

ENTER: 21 July 1989
/s/ James H. Chamblin
JAMES H. CHAMBLIN,
JUDGE

TWENTIETH JUDICIAL COURT
OF VIRGINIA
[LOGO]
Fauquier, Loudoun and
Rappahannock Counties

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Judge Retired
Carleton Penn,
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21 July 1989

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In Re: *Commonwealth of Virginia*
vs.
William Evans-Smith
Criminal No. 4700

Gentlemen:

On May 16, 1989 the defendant filed a Motion to Set Aside the Verdict rendered herein on April 27, 1989, and on May 25, 1989, the defendant filed a motion which started the process toward a motion for a new trial based on alleged juror misconduct.

For the reasons hereinafter set forth, both Motions are denied in their entirety. Each Motion is addressed below.

I. MOTION TO SET ASIDE THE VERDICT

A. Sufficiency of the Evidence

The defendant asserts that the evidence presented at trial is insufficient as a matter of law to sustain a conviction. The evidence against the defendant in this case is entirely circumstantial. Therefore, all the necessary circumstances proved must be consistent with guilt and inconsistent with innocence; they must create more than a suspicion of guilt, however strong, or even a probability of guilt; and they must exclude every reasonable theory of innocence. *Bishop v. Commonwealth*, 227 Va. 164, 169 (1984); *Stover v. Commonwealth*, 222 Va. 618, 622 (1981); *Inge v. Commonwealth*, 217 Va. 360, 366 (1976). Circumstantial evidence which is convincing is entitled to the same weight as direct evidence. *See Parks v. Commonwealth*, 221 Va. 492 (1980); *Mullis v. Commonwealth*, 3 Va. App. 564 (1987). The jury was fully instructed on these circumstantial evidence requirements. See Instruction No. 5.

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant did murder Barbara Evans-Smith (hereinafter "Barbara" or "the victim"). The Commonwealth has the burden to prove each element of the offense beyond a reasonable doubt, viz. that the defendant killed Barbara Evans-Smith and that the killing was done with malice.

All references herein to the facts of the case as presented at trial are based on my recollection of the evidence and the transcripts that have been prepared.

No one will dispute that Barbara Evans-Smith was murdered. The defendant denies that he committed the murder. Therefore, the central issue is whether the defendant was the perpetrator of the crime. The Commonwealth had to show that the defendant was the criminal agent beyond a reasonable doubt. A long line of cases starting with *Dean's Case*, 73 Va. 912 (1879) and ending with *Brown v. Commonwealth*, 238 Va. ___, 5 VLR 2935, decided June 9, 1989, make it clear that those circumstances *which are proved* must all concur to form an unbroken chain which links the defendant to the crime beyond a reasonable doubt, and those inculpatory circumstances are motive, time, place, means and conduct. See *Cantrell v. Commonwealth*, 229 Va. 387 (1985).

If there was ever any doubt, it was resolved in *Brown* that motive is not an element of murder even in a purely circumstantial evidence case. The Virginia Supreme Court stated:

"In keeping with our decisions that motive (as distinguished from intent) is not an essential element of murder in a direct evidence case, we have never said, *and we*

now expressly disavow, that motive is an essential element of murder in a circumstantial evidence case. What we have said, and now reaffirm, is that once motive is *proved*, the underlying evidence of motive must concur with the circumstantial evidence of other inculpatory circumstances – time, place, means, and conduct – in identifying the accused as the criminal agent beyond a reasonable doubt." (emphasis mine) *Brown v. Commonwealth*, 5 VLR 2935 at 2945. Our Court of Appeals has reached a similar conclusion when it stated:

"Although the rule as to cases based entirely on circumstantial evidence is that necessary circumstances must be consistent with guilt and inconsistent with innocence, *all of the circumstances of time, place, motive, means and conduct do not have to be proved beyond a reasonable doubt in every case.* See *Cantrell v. Commonwealth*, 229 Va. 387, 398, 329 S.E. 2d 22, 29 (1985); *McGee v. Commonwealth*, 4 Va. App. 317, 322, 357 S.E. 2d 738, 740 (1987); *Mullis v. Commonwealth*, 3 Va. App. 564, 575-76, 351 S.E. 2d 919, 926 (1987). Motive, for example, need not always be proved. *Cantrell*, 229 Va. at 398, 329 S.E. 2d at 29. Therefore, the lack of evidence of motive in this case is not crucial." (emphasis mine)

Stevens v. Commonwealth, 8 Va. App. ___, 5 VLR 2439, 2444-2445, decided March 21, 1989.

The lack of evidence of motive is not crucial in this case. Sufficient evidence of the inculpatory circumstances of time, place, means and conduct was presented during the trial to justify the jury finding beyond a reasonable doubt that the crime was perpetrated by the defendant.

All the circumstances so proved did occur, and they were consistent with guilt and inconsistent with innocence.

Time and Place

The Loudoun County medical examiner testified that Barbara Evans-Smith died on April 15, 1985 at approximately 6:00 A.M. give or take two hours. The medical examiner who performed the autopsy said that she died thirty to sixty minutes after the last intake of food. Although the County medical examiner opined that her body had been placed, and had not fallen, on the floor of her bedroom in the couple's home on Route 725, there was no evidence that she had been attacked and/or died outside of the home.

Evidence of the defendant's activities that morning came from statements he made to various police officers and other persons. He and Barbara had gone to bed the night of April 14th (a Sunday). He arose at or shortly before 5:00 A.M. Although he normally walked or jogged down to get the newspaper at the box at the end of the quarter mile long gravel driveway on Route 725, he drove down in his vehicle that morning. His headlights shown upon a dark van parked on Route 725, but he saw no occupants. He and Barbara had breakfast sometime between 5:30 and 6:00 A.M. of dried peaches and toast. He left for work no later than 6:30 A.M.

The evidence conflicted as to when he arrived at work that day, but the defendant did tell investigators that he established patterns very easily. Several law enforcement officers from various jurisdictions testified to the lack of unusual traffic delays in Virginia, Maryland

and Washington, D.C. on the morning of April 15, 1985. Dorothy Lohman, a co-worker of the defendant, testified that although the defendant was often at work between 7:30 and 8:00 A.M., he was not in yet that morning at 8:45 A.M. Another co-worker, Harriet Blood, said he was there at 8:45 A.M. Other co-workers indicated he arrived, or was at the office, by 8:30 A.M.

The defendant presented no alibi evidence. His own statements placed him in the house where the murder occurred during better than one-half of the time period during which Barbara could have died. Considering death occurred within thirty to sixty minutes of eating, the defendant's own statements of when they ate breakfast placed him there during most, if not all, of that time period.

Means

Although he may have been in his sixties, the defendant was in good physical shape. Deputies Gibson and Wright both testified that the defendant was a strong person as a result of their observations of him during the altercation at the end of the driveway on the day of the crime when the defendant wanted to see his wife's body, but was denied. The autopsy showed that Barbara Evans-Smith was 5'3" tall and weighed 145 pounds. The jury observed the defendant during the trial both sitting and standing. He had the size and the strength to strangle his wife, especially if she was surprised by the attack. It is more likely that someone she knew rather than a stranger could have gotten close enough to her to attack her by surprise.

The cause of death was strangulation by ligature. A pair of pantyhose was found wrapped around Barbara's neck. Clearly the pantyhose was the instrument of death. Another pair of pantyhose was found on the dresser near where Barbara was found lying dead. It can be inferred that the pantyhose used to strangle her was easily accessible and available to the defendant.

Conduct

The evidence of the conduct of the defendant during the time that death occurred has been outlined above. However, conduct of an accused following a crime is just as relevant in most cases as conduct before, particularly when its purpose is to conceal guilt. *See Pearson v. Commonwealth*, 221 Va. 936 (1981).

When informed of his wife's death by Investigators Brown and Merchant on the afternoon of April 15, 1985, the defendant's initial questions could be considered inconsistent with one who had been completely surprised at learning of his wife's unexpected death. At that time the defendant gave a different location for the dark van on Route 725 than he did when interviewed by Investigators Brown and Merchant on Wednesday, April 17, 1985. He made varying statements to different persons as to where Barbara was standing when she waived good-bye to him to morning as he left for work. There was evidence that he met with and/or spoke to friends and co-workers after the date of the offense in an effort to get them to all ascertain exactly when he arrived at work that morning. He told some persons he made no stops on the way to

work, yet he told Ms. Tandler in January 1986 that he had stopped at a car wash on the way to work.

The defendant told the investigators that he had worked on the farm all day the prior Saturday during which he cleared locust bushes. He and Barbara went to the Point to Point races at Oatlands the next day. Witnesses differed on whether they saw scratches, cuts or bandages on the defendant's hand or hands at that time. Two officers noticed stratches [sic] on the defendant's hands while he waited at the gate to his farm while the police investigation was taking place. A photograph of the defendant's arm taken on April 17, 1985, showed scratches that at least one doctor opined were caused by human fingernails. At the end of the driveway on the day of the offense the defendant demanded to see his wife's body, yet when he had the opportunity at the funeral home two days later he did not ask to see the body.

Two blood stains consistent with the blood of the defendant were found on Barbara's robe. Hairs with the same characteristics as that of the defendant were found near the right hand of the victim, from her pubic area and on the clothing she had on when found. Blood consistent with the defendant's was found on facial tissue in the waste basket of his bedroom.

Blood consistent with the victim's was found on at least five places on her robe. Blood stained or tinged fluid was found in the victim's ear which Dr. Beyer said came from her lungs through her mouth and into the ear as she lay on the floor. The gag which had blood on it was placed in the mouth after the initial discharge. Such fluid was discharged at anytime during or after the attack. It

could, therefore, be the source of the blood on the victim's robe. More than one witness testified that Barbara kept an immaculate house. The photographs of the bedroom of the defendant indicate that he is a neat and organized person.

Shortly after the offense the defendant on several occasions told police officers that a green or aqua colored jewel box was missing. When talking to Joe Rogers, Jr. who had been, and still was, renting a field at the Evan-Smith's farm in the latter part of April 1985, the defendant asked that if he saw anything unusual to report it. On May 1, 1985, George Schooley, Jr., while disking the field, found the jewelry box. It was admitted into evidence, was observed by the jury and, other than being somewhat dented by being under the seat of Schooley's tractor, it showed remarkably little wear after being recovered approximately two weeks after the offense.

The defendant attempted to show that Barbara had been killed by other persons during what appeared to be a rape and robbery. The Commonwealth contended that the scene had been staged by the defendant. The medical examiner on the scene testified that the body of the victim had been placed, and had not fallen, where it was found. The autopsy revealed no signs of a sexual assault. No seminal fluid was found at the scene, on the victim or on her clothes. Investigator Merchant testified that he examined the exterior of the house and found no signs of a forced entry. At the foot of the stairs leading to the second floor (the body was found in a second floor bedroom) a table was found knocked over, but resting on a drawer that was in it, resting on top of the indentations of the legs in the carpet and with an arrangement of dried

flowers that was on it lying on its side, but with little or no debris on the carpet from the flowers. It appeared that the table drawer and flower arrangement had been placed, and not fallen or knocked over, where they were found.

It was raining or misting that morning. The Evans-Smith home was neat and well kept. The photographs of the interior of the house showed it to be very orderly and clean. Yet there was no blood found except on the victim's clothes, the ligature and in the aforesaid waste basket. No dirt or mud was found tracked into the house, even in the areas leading from the unlocked kitchen door to the victim's bedroom where her body was found. One of the dogs was penned up in the laundry room, and Lesleigh Cook, daughter of the defendant and the victim, testified that she had never seen that done before. The other dog was outside. THe one penned up was especially found [sic] of Barbara.

The Commonwealth contended that Barbara was killed downstairs at the kitchen table and drug upstairs to the bedroom where the scene was staged. The table and hutch in the kitchen area were found slightly off center, and drag marks were found on the linoleum of the kitchen floor consistent with the marks that could be made by dragging two feet. One of Barbara's slippers was found on the floor in or near the kitchen, and the other near the table at the foot of the stairs. Dr. Beyer testified that his autopsy revealed that Barbara had deep hemotoma to the back of the head caused by blunt force trauma which could have resulted from her head hitting a step when being drug up the stairs. Hairs consistent with Barbara's were found on the stairs. There were no hairs

found that were not consistent with the hairs of the defendant or the victim and which had been forcibly removed. Other hairs not consistent with either the defendant or the victim were found, but none of them appeared to have been forcibly removed.

Early on the defendant was asked by the officers to provide a list of the items missing, but he complained that he could not do so until he had a list of what had been taken during the investigation. The evidence was not exactly clear and definite on what the defendant told the officers at various times about what he felt was missing. The jewelry boxes and jewelry scattered on the defendant's bed was almost uniformly arranged, and did not appear to have been placed by an unknown intruder in a hurry.

The defendant attempted to show that one, or possibly two, horse trainers with connections to an adjacent farm could have been the assailants. The evidence as to when the two trainers, Robert Rivera and Rudy Ruiz, were at the adjacent farm (Grassy Mead Farm) that morning was conflicting. Mr. Rivera testified he was there only about forty minutes, arriving about 6:15 to 6:20 A.M. and leaving a little after 7:00 A.M. His wife, who was living with him in Charles Town, West Virginia at the time corroborated his testimony. They were divorced at the time of the trial. A private investigator hired by the defendant testified that Rivera had told him that he had arrived at 8:00 A.M. and was there about 15 minutes. The same investigator testified that Rivera told him he was broke, but Rivera and his wife testified at trial that they had no money problems at that time even though he had

been "ruled off" the Charles Town, West Virginia racetrack where he had been training horses. The jury was properly instructed that evidence of a prior inconsistent statement only bears on a witness' credibility.

Rivera testified that he and Ruiz came to Grassy Mead that day to pick up a horse and take him to the track in Charles Town to work him. Even though there are security guards at the gate to the track who are required to log in each horse carrier, there was no written record of Ruiz or Rivera or the specific horse coming into the track that morning. However, Mrs. Rivera, who had plenty of knowledge of the track, testified that it was not unusual for the guards not to make a record of every horse carrier that came into the track, especially if they were known to the guard.

There is a lack of any physical evidence to show that Rivera or Ruiz, horse trainers, who are outside and handling horses everyday, were ever in the Evans-Smith home. There was no evidence that Barbara was attacked or died outside of the house. There was no evidence to link the extraneous hairs found in the house to either Rivera or Ruiz.

There was no evidence that the vehicle Rivera and Ruiz used that day was a van or similar to what the defendant said he saw on Route 725 that morning. Rivera testified that he was driving a Chevrolet Club Cab Long Truck, which is not a van in appearance. His wife said it was a pick up truck with a gooseneck trailer, and that neither he nor any of his acquaintances had a van.

The defendant presented the testimony of Tracy Dillon about a van with Louisiana tags that pulled in front of

her and failed to let her pass on Route 690 sometime after about 8:25 A.M. that morning. This occurred five to six miles and about ten minutes away from the Evans-Smith farm. It accurred [sic] on a road that was not the most direct route between the farm and Charles Town.

The Commonwealth presented a series of witnesses who drove on Route 725 that morning before and after the time that the defendant said he saw the van. None of the witness [sic] said they saw a van. The meteorological evidence indicated that the time of sunrise on that morning was about 5:32 to 5:34 A.M. A neighbor testified he went down his driveway at 6:15 A.M., and he had turned on his headlights. There was conflicting evidence concerning the tire tracks in the driveway. However, considering all the meteorological evidence, it could be concluded that the defendant only made one trip down the driveway that morning in his vehicle, and that was when he left to go to work. Evidence of one set of tire tracks was presented, and the defendant could have had his lights on when he left to go to work.

The jury observed the witnesses and all the proceedings before it in the case. The jury is the judge of the credibility of the witnesses. The jury went over all the numerous exhibits admitted into evidence. Having heard and seen all the evidence, I am of the opinion that there was sufficient evidence presented for the jury to find under the instructions given that the defendant did murder Barbara Evans-Smith.

B. Denial of Motion for Change of Venue

I am still of the opinion that I was correct in denying the motion for change of venue for the reasons stated from the bench on December 14, 1987. I do not feel that any of the proceedings in this case between then and now are sufficient grounds to reverse my decision. Considering the prior history of this case, I do not feel that it took an inordinate amount of time to empanel a jury. For reasons stated below, a fair an [sic] impartial jury was empanelled for the trial of this case.

C. Motion Pursuant to Section 19.2-243 of the Code of Virginia

The Court's ruling on this motion will remain the same. I feel the motion was properly denied for the reasons set forth in my opinion letter of March 24, 1989.

D. Evidence of Drug Trafficking and Conspiracy Charges of Robert Rivera

The defendant asserts that the Court erred in not allowing him to introduce evidence at trial that Robert Rivera had been convicted of a felony drug offense in federal court in Texas and of his drug related activities in that case. The defendant contends that such evidence was needed to identify Rivera as a possible third party criminal agent who remained uninvestigated by the police and who was shown to be connected to the crime by a series of circumstantial facts of probative value equal to or greater than those composed against the defendant by the Commonwealth.

Rivera was called as a witness for the defendant. Under Section 8.01-403 a party calling a witness cannot impeach his credit by general evidence of bad character, but if the witness proves adverse, then with leave of Court it may be shown that the witness made prior inconsistent statements. Evidence of criminal conviction or wrongdoing is most always offered to affect a witness' credibility. That is not the case here. This evidence was offered to implicate Rivera as the possible perpetrator, and, incidentally, to show an incomplete investigation by the police. Specifically, it was offered to show motive on Rivera's part; and, therefore, he should have been investigated sooner by the police.

The evidence admitted at trial that purports to implicate Rivera is that he was at an adjacent farm the morning of the offense with a person he had brought to Virginia from Louisiana, and that a van with Louisiana tags was seen approximately five miles from the Evans-Smith farm that morning sometime after 8:25 A.M. The evidence against Rivera is not very convincing. Evidence of his conviction would show nothing other than that he is of bad character and is a person likely to commit a crime. If Rivera had been on trial, then the Commonwealth could not have used such evidence against him except to impeach his credibility if he takes the stand. I cannot agree that the circumstantial evidence against Rivera is equal to or greater than the circumstantial evidence against the defendant.

The defendant cites *Hines v. Commonwealth,* 136 Va. 728 (1923) and *Karnes v. Commonwealth,* 125 Va. 758 (1919) as authority for allowing such evidence. In both of those cases there was some connection between the victim and

the alleged third party. Here there was no evidence of any drug involvement by the victim. There was no evidence that Rivera may have been aware that money or valuables were in the Evans-Smith house. The evidence at trial from Rivera and his wife at the time of the offense was a lack of any money problems. Any prior inconsistent statements only affect credibility, and are not evidence of the truth of what was said. Even if one does not believe Rivera and his then wife, it would be sheer speculation of the extent, or even the existence, of a money problem.

The defendant argues that he should have been permitted to introduce evidence of the conviction to show an inadequacy in the police investigation. A deficient investigation may result in a lack of sufficient evidence or inadmissible evidence, but I do not feel that a deficient investigation is a defense to a crime so as to allow the defendant to have admitted in evidence all the information that the police had or should have known during the investigation. Such evidence must be admissible under the rules of evidence.

The conviction evidence (which includes evidence of the charge, the conviction and the statements made at sentencing) was not probative of motive to kill Barbara Evans-Smith. Its prejudicial effect on the Commonwealth outweighed any probative value it may have had for the defendant. Just because a certain fact may have been known to the police does not make it automatically admissible in evidence.

The defendant now argues that he should have been allowed to introduce evidence of a Loudoun investigator's help to Rivera when he was sentenced on the drug

charge because it shows bias. Even if it were deemed that Rivera proved adverse, the defendant cannot attack his character or reputation for truthfulness by a prior conviction. See *Friend,* Law of Evidence in Virginia (3d Ed. 1988). It would have been necessary to show the conviction in order to show the bias.

For all the foregoing reasons, the evidence of Rivera's conviction and related circumstances was not allowed in evidence. I am of the opinion that the ruling at trial was correct.

E. Improper Argument and Conduct by the Commonwealth's Attorney

1. Improper Argument in Closing and Rebuttal

All of the statements in closing argument by the Commonwealth's Attorney concerning the travelers on Route 725 that morning, the house being kept locked by Barbara Evans-Smith and her waiving good-bye to the defendant from the bedroom window were not misrepresentations, misstatements or extravagant claims as asserted by the defendant. Each was a fair and proper argument by the Commonwealth's Attorney.

His statement that the blonde hair found on the steps "had fallen there" was completely consistent with the testimony of Deanna Dabbs, a forensic scientist, that the hair "was consistent with having fallen out."

The Commonwealth's Attorney stated in rebuttal that there was one head hair found in the pubic combings of the victim that had been forcibly removed and it was consistent with the defendant's hair. The only testimony

concerning scientific analysis of hairs was that of Ms. Dabbs. She did not testify that any hair consistent with the defendant's hair was found in the pubic combings. Despite the defendant's argument in his memorandum (see page 24 thereof) about defense counsel's vehement objection to the "forcibly removed" comment, the matter of most concern to defense counsel at the bench conference after the objection was made was the reference to hair found in the pubic combings. Defense counsel did not ask for a mistrial or a curative instruction. After the bench conference the Commonwealth's Attorney told the jury that the head hair was found in the pubic area, and he correctly stated that it was the joint recollection of jurors that controls. The transcript of the bench conference is not complete, but it is my distinct recollection that defense counsel did not object to the Court's suggestion that the Commonwealth's Attorney correct his statements. There was no further objection made even though no mention was made by the Commonwealth's Attorney after the bench conference as to the "forcibly removed" statement he had previously made.

The defendant's allegations concerning statements made about blood found on the victim's "throat" are now moot because the transcript has been corrected to show that the Commonwealth's Attorney said "robe", and not "throat".

2. Statements in Opening Concerning Evidence Never Admitted During Trial

The Commonwealth's Attorney made statements in his opening concerning an alleged extramarital affair of

the defendant and some guns of the defendant. Evidence on both of these subjects was not admitted during trial.

The jury was instructed by the Court prior to opening statements that it was their duty to determine the facts from the evidence and all reasonable inferences therefrom, and that what the attorneys may say is not evidence. The jury is to follow the instructions of the Court, and it must be assumed that they do so.

Considering the vast amount of evidence presented during the trial, I fail to see how the defendant might have been prejudiced by the statements concerning the guns. As to the statements in opening about the extramarital affair, defense counsel quite pointedly brought it to the attention of the jury, in closing argument, when he emphasized the lack of evidence as to the alleged affair. It was used to show weakness in the Commonwealth's case. At no time did defense counsel request a cautionary instruction.

When the statements were made in opening the Commonwealth's Attorney had reason to believe that such evidence would be admissible because it was admitted at the first trial without objection by the defendant. The evidence was objected to by the defendant in this trial. Considering how the case was tried by defense counsel, I cannot find that such statements prejudiced the defendant to the extent that a new trial should be awarded.

3. Failure to Properly Instruct Witnesses Not to Communicate with other Witnesses or Mention the Prior Trial

The matters of communication by Commonwealth witnesses with other witnesses were thoroughly inquired into by the Court when brought to its attention during trial. With respect to Sheriff Isom, after an *in camera* proceeding, the Court admonished him not to discuss the case with anyone else until it was concluded. Defense counsel agreed with the admonishment and did not object further or request any further sanctions or relief. As to Investigator Brown, the Court, after a hearing in open Court, similarly admonished him after finding that he had not discussed the case with other witnesses. Again, there was no further objection or request for further relief from defense counsel.

Sheriff Isom did testify on cross-examination that he had "been through this Court case one time." Counsel was instructed prior to trial to tell all witnesses to refer to the prior trial as a prior hearing. The Court wished to avoid having the jury hear the word "trial", but it is certainly reasonable to assume that most, if not all, of the jurors had a pretty good idea by the time that Sheriff Isom testified that this case had previously been in Court for some reason. Both the Commonwealth's Attorney and defense counsel had been utilizing transcripts from the prior trial while at the podium in questioning witnesses. The jurors were not close enough to read the transcripts, but were close enough to tell that they were transcripts. Sheriff Isom did not say "trial." The answer he was giving was responsive to the question posed by defense

counsel. I cannot find that Sheriff Isom deliberately inserted the comment. Given the four years between the date of the offense and the time of trial, a juror could certainly believe that the Sheriff had to have been involved in some prior Court proceeding. Further, the numerous references to "prior hearing" during the trial in response to questions by *both* the Commonwealth's Attorney and defense counsel diluted the effect of the Sheriff's comment. I cannot see that much difference between his comment and "prior hearing" used by other witnesses and counsel.

The rule on exclusion of witnesses was not violated by the conduct of Sheriff Isom or Investigator Brown. The purpose of the rule is to prevent a later witness from shaping his testimony to correspond to earlier testimony in the case. The rule is aimed at the witness who has not yet testified. Sheriff Isom and Investigator Brown had already testified when their alleged improprieties occurred. They were not called to testify thereafter. See *Friend, supra,* Section 13.

All of the alleged misconduct by the Commonwealth's Attorney does not warrant the granting of a new trial.

F. Failure to Grant Mistrial During Testimony of Sheriff Isom

For the reasons set forth above, I am of the opinion that there was no error in failing to grant a mistrial because of Sheriff Isom's comments about having "been through this Court case one time."

The defendant also contends that the comment of Sheriff Isom and the necessity for repeated references to the prior proceedings and transcripts had the effect of prejudicing the defendant by informing the jury of a prior trial or causing them to infer an attempt to conceal information from the jury. I do not agree. Defense counsel engaged in numerous references to what a witness said at the "prior hearing". Defense counsel did not express any concern to the Court before or during trial about repeated references to a "prior hearing". Both the Commonwealth and defense counsel knew that each side would utilize the transcript of the prior trial if a witness testified differently than at the prior trial. If there was any prejudice to the defendant by such references to the proceedings, then there was also prejudice to the Commonwealth, and both the Commonwealth and the defense engaged in the same conduct. The defendant cannot complain of prejudice resulting from a trial tactic which he also utilized.

G. Conclusion

For all the reasons set forth above, the Motion to Set Aside the Verdict is denied in its entirety.

II. MOTION FOR A NEW TRIAL BASED UPON ALLEGED JUROR MISCONDUCT

On May 25, 1989, the defendant filed a motion requesting the Court to investigate the responses given to *voir dire* questions by three jury panel members. Attached to the motion were affidavits of two defense-employed private investigators, Robert Puglisi and M. Morgan

Cherry, concerning interviews with jurors Paul Michael, Judith Davis and Robin Grimm conducted after the completion of the trial. Based on the affidavits, which raised the possibility of juror misconduct, the Court granted the motion and conducted a hearing on June 13, 1989, at which time the three jurors and Mr. Puglisi testified. After the presentation of the evidence and argument of counsel, the defendant moved the Court for a new trial based on alleged juror misconduct.

The following findings are made based upon the evidence presented at the hearing. The affidavits served only as a basis for determining that a hearing should be held. Any statement of a juror made to a private investigator was received as either a prior consistent or inconsistent statement affecting the juror's credibility. Also, I must consider that the private investigators were retained by the defense and approached each juror unannounced with a definite purpose. Although, the interviews were admittedly taped by the private investigators, no transcripts or the recordings themselves were offered by the defendant. Also, I cannot ignore the admonition given in adultery cases that the testimony of private investigators should be received with great caution. I feel the same should apply where a defendant is attacking the sanctity of a jury verdict.

A. Juror Paul Michael

During *voir dire* Mr. Michael stated that he had not acquired any information about the alleged offense or the defendant from the news media or any other source. When asked if he had heard of the case from newspaper

reports, television reports or discussion of friends, he replied, "I don't believe so, no." He said he was sensible of any bias or prejudice against the Commonwealth or the defendant. Defense counsel stated at the end of *voir dire* of Mr. Michael, "(w)e have no issue with this gentleman," and he was not challenged for cause by the defendant.

As the evidence was presented during the trial Mr. Michael remembered that there had been a murder in Loudoun County and someone had killed his or her spouse. He did not remember the details. He had no independent recollection of a murder in Loudoun County or that someone killed his or her spouse at the time he answered the *voir dire* questions. At the hearing he stated "I honestly did not know anything about this case," and when asked by the Commonwealth's Attorney if there was anything he remembered during the trial that would have affected his ability to sit fairly and impartially, he responded, "No, sir. I went solely on the evidence and testimony, and that's it."

In his affidavit and during his testimony Mr. Puglisi said that when he asked Mr. Michael how he could equate what he had heard before the trial with what he heard in the courtroom, he responded that "it was the strangulation thing." At the hearing Mr. Michael said he did not remember saying this, but he did not deny it either.

Mr. Michael did not inform the Court or counsel during the trial of what he had remembered.

B. Juror Judith Davis

During *voir dire* Ms. Davis answered in response to the Court's question as to her acquisition of any information about the offense or the defendant: "Only from what I've read in the paper and that was quite sometime ago." She said that the information would not affect her impartiality, and she had not arrived at any opinions or conclusions with respect to this case. When questioned by defense counsel as to her prior knowledge, she stated that

1. she read it in the Loudoun Times-Mirror;
2. the details were "very sketchy at best";
3. she remembered as to the details only "something about his occupation" and "about some place downtown."

She had no other recollection of any other details or any prior proceedings. Ms. Davis was not challenged by the defendant on the basis of her prior knowledge.

Based on her testimony at the hearing, Ms. Davis did know during *voir dire* that the defendant was "employed downtown" and that "his wife had been murdered." As the evidence was presented during the trial, she remembered more about what she had read but she cannot remember exactly what she had read. She could say only definitely that she'd read something before about strangulation by pantyhose. She was not sure of having read before about the tire tracks, Robert Rivera or the extramarital affair. Ms. Davis did not inform the Court or counsel that she recalled certain things during the course of the trial.

At the hearing Ms. Davis identified an April 1985 Loudoun Times-Mirror article that she thought she had read.

Ms. Davis said that there was nothing that she remembered during the course of the trial that she may have read before that would have affected her ability to sit fairly and impartially as a juror in this case.

In his affidavit and testimony at the hearing Mr. Puglisi said that when he asked Ms. Davis if any of the jurors had been exposed to news, television or may have had something in the back of their minds concerning the case, she said "well, I could be one of those." But she said unequivocally at the hearing that she was merely referring to what she knew at *voir dire* and the answers she gave to the questions posed to her at the time. She knew it was a retrial because of the numerous references to prior testimony and proceedings during the trial, but she did not know that the defendant had been previously convicted until after this trial was concluded.

In answer to a question by defense counsel at the hearing Ms. Davis may have seemed to indicate that there were things she read or heard about the case before she sat as a juror but which were not presented in the Courtroom, but defense counsel did not pursue this issue. However, her answers to further questions by the Court on the subject show that she was only thinking of the extramarital affair and that it was first mentioned to her by a co-worker after the conclusion of the trial. She said that she was not aware of the extramarital affair until after the trial. The jurors may have wondered why Ms. Bunge was recognized by the Court as a witness, but did

not testify, but there was nothing presented to indicate that any of the jurors associated her with the extramarital affair.

As an aside from matters pertaining specifically to Ms. Davis, it must be noted that during trial just after the Court made its ruling excluding testimony of the extramarital affair, the Commonwealth asked the Court to recognize Ms. Bunge because the Commonwealth's out of state witness certification for her had or was about to expire. The Court specifically asked defense counsel if they wished this to be done outside of the presence of the jury. In response, defense counsel did not object to it being done in the presence of the jury.

C. Juror Robin Grimm

During *voir dire* Ms. Grimm was asked by the Court, "(h)ave you or any member of your family ever been engaged in law enforcement work?" She answered, "No, sir." She stated that she served in the Army for three years attaining the rank of E-4 when she was discharged.

While she was in the Army, Ms. Grimm had been an "administrative specialist" in the Criminal Investigations Division (CID) at Fort Meade. Her description of the job was that she was basically a secretary, a driver for generals, a mail clerk, a word processor and that she mowed grass. She was not involved in any criminal investigations, she did not assign investigators and she had no military police training. She never discussed a case with an investigator. Being the mail clerk she had to open envelopes to see that the contents went to the correct person. She only saw criminal evidence as it came

through the mail room, and then only to see that it went to the correct place. She only saw final investigation packages, and never was involved in any on-going investigation.

During *voir dire* it did not occur to Ms. Grimm at all that her duties at CID had anything to do with the question concerning law enforcement work. She was, in her own words, "just a clerk, just, you know, more or less a secretary and a catch all, I didn't really think that was very important."

Ms. Grimm did not bring her duties at CID to the attention of the Court or counsel during the trial. She stated that there was nothing in her prior military training or service that would have affected her ability to sit fairly and impartially as a juror in this case.

There was no evidence presented at the hearing that indicated in any way that any of the three jurors told the other jurors of their prior knowledge, except that Ms. Grimm might have told one or more jurors that she "was military." None of the three jurors indicated that the jury had considered or heard any evidence or information outside of what was presented during the trial.

When asked on *voir dire* if any of the three aforesaid jurors knew any reason whatsoever why they could not give the defendant a fair and impartial trail based solely on the law and the evidence, they all responded in the negative.

D. Application of Law and Conclusions

Certainly a defendant in a criminal case is entitled to be tried by an impartial jury. U.S. Const. Amends. VI and XIV; Virginia Const. Art. I, Section 8. However, at the same time it is virtually impossible to have a juror that is shielded from every influence or contact that might affect his decision. Due process means a jury capable and willing to decide the case solely on the evidence before it coupled with a trial judge preventing prejudicial occurrences and to determine the effect of such occurences if and when they happen. *Smith v. Phillips*, 102 S. Ct. 940, 946 (1982). *Voir dire* as a safeguard for jury impartiality is not infallible, and, at the same time, due process does not require a new trial everytime a juror is placed in a potentially compromising situation. *Id.* at 946. If that were the rule, few trials would be constitutionally acceptable. It is a time-honored maxim that a defendant is entitled to a fair trial, not a perfect one for there are no perfect trials. *McDonough Power Equipment, Inc. v. Greenwood*, 104 S. Ct. 845, 848 (1984); *Brown v. United States*, 93 S. Ct. 1565, 1570 (1973). Nor is a defendant entitled to a panel of jurors who are wholly ignorant of the case. *Irvin v. Dowd*, 81 S. Ct. 1639 (1961); *Raulerson v. Wainwright*, 753 F. 2d 869 (11th Cir. 1985); *Justus v. Commonwealth*, 220 Va. 971 (1980). *Also, see L.E. Briley v. Commonwealth*, 222 Va. 180 (1981).

I cannot agree with the defendant's contention that it is not necessary to show bias or prejudice resulting from the non-disclosure or concealment by the juror. I cannot agree that the juror disclosure required in Section 8.01-358 gives the defendant a new trial automatically if a

juror concealed information. The statute in my opinion applies to a juror who actually knows something as opposed to a juror who has heard or read or been told something about the case. Except for the District of Columbia cases and, possible, one California case cited by the defendant, all cases cited by counsel show that there must be some connection between the concealment or other juror impropriety and the juror bias or prejudice.

In *Smith* the U.S. Supreme Court stated:

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

102 S. Ct. at 945.

In *McDonough* the same Court stated:

> The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

104 S. Ct. at 850.

I feel that this is a similar standard to that set forth by our Court of Appeals in this case, when it stated:

> The test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced.

5 Va. App. at 207.

In other words, it is not a *per se* test, but a test of reasonableness. The Court of Appeals explained how the

almanac information in the first trial might have prejudiced the jurors. It did not rule that just because a juror consulted an almanac and shared the information with the other members of the jury, the defendant is automatically entitled to a new trial. The reasonable possibility of prejudice had to be shown.

In *Briley* the Virginia Supreme Court, following *Irvin v. Dowd,* held that the mere existence of any preconceived notion as to guilt or innocence without more is insufficient to rebut the presumption of a prospective juror's impartiality. It is sufficient if a juror can set aside his impression and render a verdict based on the evidence presented in Court. 222 Va. at 186. Also, in *Mullis v. Commonwealth,* 3 Va. App. 564 (1987) the Virginia Court of Appeals held that whether a juror should be excused for cause should be decided upon a review of the entire *voir dire* and not just on the answer to one isolated abstract question of whether a juror would tend to believe a police officer as opposed to a private citizen. 3 Va. App. at 572.

Although counsel has not cited and I have not found a Virginia case directly on point, I am of the opinion that in light of the two Virginia cases referred to above and the Virginia Supreme Court decision in *Clozza v. Commonwealth,* 228 Va. 124 (1984) bias or prejudice must be shown in order to entitle the defendant to a new trial.

> A prospective juror is not subject to automatic exclusion because of an association with law enforcement personnel, provided the juror has no knowledge of the facts of the case and *demonstrates impartiality* toward the parties. (emphasis mine)

228 Va. at 129.

Assuming that the concealment does not constitute grounds for challenge for cause, the failure to accurately answer a *voir dire* question does not deprive the defendant of information needed to exercise his peremptory challenges. *United States v. Fryar,* 867 F. 2d 850 (5th Cir. 1989)

Although there may be jurisdiction to the contrary, I am of the opinion that the majority and better view is that there must be some nexus between the concealment or impropriety of the juror and the juror bias or prejudice against the defendant. The Virginia Supreme Court has recognized that the decision of the trial judge who had the opportunity to observe the prospective jurors on *voir dire* is entitled to much deference. *Smith v. Commonwealth,* 219 Va. 455, 464-465 (1978). The same should apply to a hearing on alleged juror misconduct. With these principles in mind, I will address the circumstances involved with each juror.

1. Juror Paul Michael

At most Mr. Michael recalled for the first time during the trial that sometime prior to the trial he had acquired information that there had been a murder in Loudoun County and someone had killed his or her spouse. The former was an undisputed fact at trial, and the latter was not connected to the defendant by Mr. Michael. He recalled no other details of the case. He did not even say that what he remembered was specifically applicable to this case. He didn't even know what spouse had done the killing. Mr. Michael honestly did not recall anything at all

about the case during *voir dire*. The little that he remembered during the trial does not tend to show any partiality on his part. His reason for his answers on *voir dire* were honest. He just did not remember at that time.

Mr. Michael's recollections during the trial are very general and nebulous. His recollections may not have even had anything to do with this case. The jury was instructed to decide the case based on the law and the evidence. Jurors are presumed to follow the instructions of the Court. See *Raulerson*, 753 F. 2d at 876.

A mere showing of the possibility of prejudice is not enough. *United States v. Barber*, 668 F. 2d 778 (4th Cir. 1982).

I cannot find that Mr. Michael, based on what he remembered during the trial, was biased or prejudiced against that defendant, and I cannot find that his decision as a juror was based on anything other than the evidence presented at the trial.

2. Juror Judith Davis

Considering all the evidence presented, I cannot find that Ms. Davis knew any more during the course of the trial than she revealed on *voir dire*. She may have recognized the *Times-Mirror* article at the hearing, but that does not prove that she had all the information set forth therein in her mind as she sat as a juror. It's common knowledge that human beings do not remember all that they read. The possibility of her remembering it is not enough. I am constrained to believe what Ms. Davis testified to under oath.

It's obvious to the Court that Ms. Davis read and discussed this case after the trial was concluded. She was not definite in stating when she read and/or discussed the extramarital affair, the tire tracks, Robert Rivera or the pantyhose. It is most telling that when asked what things she read or heard before that did not come out during the trial, all she mentioned was the extramarital affair, but when she was pursued on the point by the Court, she admitted that it came up after trial. She specifically denied any knowledge of the extramarital affair during the trial.

The defendant argues that if Ms. Davis had answered on *voir dire* as she did at the hearing, then she would have been excused for cause. This is an inappropriate argument because at *voir dire* she had not yet heard the evidence and was not shown the newspaper article. Defense counsel was not in any way prevented by the Court from exploring the extent of Ms. Davis' knowledge at *voir dire*. Further, it would have been objectionable to have shown Ms. Davis the newspaper article on *voir dire*.

Even if Ms. Davis did remember something about the tire tracks, Robert Rivera or the pantyhose during the trial, the defendant did not elicit from her the details of each subject. There was evidence presented on all three subjects at trial. If what she remembered is the same as the evidence at trial, then how is the defendant prejudiced? Likewise, to find that the specifics were different would be sheer speculation. Possibility or prejudice is not enough. The sanctity of a jury verdict should not be attacked and the verdict set aside on speculation or possibility of prejudice.

Ms. Davis answered the *voir dire* questions honestly. While there may be some impropriety on her part in not coming forward during the trial to indicate what she started to remember, I cannot find her decision to he dishonest or an indication of her bias or prejudice against the defendant. There is nothing to support a finding that her decision as a juror was based on any evidence or information outside that presented in the Courtroom.

3. Juror Robin Grimm

The language of the question posed to Ms. Grimm on *voir dire* concerning law enforcement work was developed by and requested by the defendant. The crucial words are "engaged in law enforcement work." As Ms. Grimm explained her duties while with CID in the Army, she could easily and reasonably felt that she was not engaged in law enforcement work. As asked, she could have reasonably felt that it only applied to a person actually enforcing the law, such as a military policeman or investigator, or someone with arrest or investigatory duties and powers. She did not have arrest powers or investigative duties. She was merely a secretary, clerk, driver and performer of odd jobs. She was not asked if she was ever "involved with," "associated with" or "employed by" law enforcement. A juror can't be expected to answer a question not posed to him or her. Further I feel that this situation is very close to that found in *Clozza*. Her CID duties would not have given rise to a challenge for cause. There has been no showing whatsoever that Ms. Grimm was aware of any of the facts of the case or that she was not impartial.

As it was asked, Ms. Grimm answered the question fairly and honestly. If the question is entitled to more than one reasonable interpretation, then it is not grounds for a new trial just because the juror interpreted the question different from defense counsel. *See United States v. Fryar,* 867 F. 2d 850 (5th Cir. 1989) where a new trial was denied even though a juror concealed a DWI conviction when asked if he had ever been convicted of a crime. Just as that juror felt DWI was not a crime, Ms. Grimm felt that she was not engaged in law enforcement work.

No bias or prejudice has been shown on the part of Ms. Grimm. I cannot find that her duties while in the Army with CID made her biased or prejudice against the defendant.

All three jurors stated specifically at the hearing that there was nothing that any of them had read or heard or experienced before the trial that affected their impartiality. There was no showing of any improper motive for concealment by any of the three jurors. While there may be some dispute that "inferred bias" or "implied bias" can exist regardless of what the juror or other evidence may say about a juror's impartiality, I feel that such bias could exist in an appropriate case. For example, see Justice O'Connor's concurring opinion in *Smith,* 102 S. Ct. at 948. Considering those examples, I am of the opinion that none of the alleged improprieties by the three jurors in this case rises to the level of "inferred" or "implied bias."

For all the foregoing reasons, the motion for a new trial based on juror misconduct is denied. Further, I am of the opinion that the defendant received a fair trial in this case.

The Clerk will prepare an order consistent herewith.

Mr. Muse will contact counsel to set a date for sentencing as soon as possible.

Very truly yours,

/s/ James H. Chamblin
James H. Chamblin, Judge

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA	:	CRIMINAL NO. 4700
vs.	:	
WILLIAM EVANS-SMITH	:	

ORDER

The 11th day of August, 1989, came William T. Burch, the Attorney for the Commonwealth, and James D. Forsyth, Deputy Attorney for the Commonwealth, and also came the defendant, WILLIAM EVANS-SMITH, who stands convicted of a felony, to-wit: second degree murder, and who came to the bar of this Court in the custody of a deputy sheriff, and also came Blair R. Howard and David H. Moyes, counsel for the defendant herein.

And Margaret A. Morgiewicz, Chief Probation and Parole Officer of this Court, appeared in open Court with a written report, originally prepared by S. Dean Hahn, a Probation and Parole Officer of this Court in 1986, together with a written addendum updating said report prepared by Ms. Morgiewicz on July 27, 1989. Copies of both the report and the addendum had been filed with the Court, the Attorney for the Commonwealth, and defense counsel more than five (5) days prior to this hearing date. A formal reading of the said report and its addendum was waived by all counsel as well as cross-examination of the said Probation Officer. With the consent of the Commonwealth, defense counsel stated for the record certain other matters that are to be considered as a part of the updated presentence report.

Upon conclusion of all the evidence and argument of counsel in regard to sentencing, the Court demanded of the defendant if he desired to make a statement or to advance any reason why judgment should not be pronounced against him. The defendant did make a statement to the Court, and upon the conclusion thereof, the Court being agreeable to the verdict of the jury, doth find the defendant, WILLIAM EVANS-SMITH, guilty of second degree murder and consistent with the jury verdict doth sentence the defendant to confinement in a facility operated by the Department of Corrections for the Commonwealth of Virginia for a period of twenty (20) years, and that the Commonwealth do recover against the defendant its costs by it about its prosecution in this behalf expended in the amount of $ to be determined.

Whereupon defense counsel advised the Court, and the Attorney for the Commonwealth and the Deputy Attorney for the Commonwealth that the defendant did intend to appeal and the defendant did state, in open Court, that he intended to appeal.

It is hereby ORDERED that with the defendant having noted his appeal in open Court, both in person and by counsel, that the execution of this sentence be and it is hereby SUSPENDED during such appeal provided such appeal is timely prosecuted.

Thereupon the defendant, by counsel, moved the Court to set bail pending appeal under §19.2-319 of the Code of Virginia. Upon the conclusion of all argument of counsel in regards thereto, the motion was denied.

The Court certifies that at all times during the trial of this case the defendant was personally present and his

attorneys were likewise personally present and capably represented the defendant.

And the defendant is remanded to the custody of the Sheriff.

ENTER: 14 August 1989

/s/ James H. Chamblin
JAMES H. CHAMBLIN, JUDGE

A COPY - TESTE
F.R. HOWARD, CLERK

By /s/ K M Acker
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Friday *the* 1st *day of* June, 1990.

William Evans-Smith,

Appellant,

against Record No. 1268-89-4
Circuit Court No. 4700

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Loudoun County
Before Judges Keenan, Moon and Willis

This petition for appeal is denied for the following reasons:

1. When the sufficiency of the evidence is challenged on appeal, the evidence is construed in the light most favorable to the Commonwealth granting to it all reasonable inferences fairly deducible therefrom. *Higginbotham v. Commonwealth,* 216 Va. 349, 218 S.E.2d 534 (1975). The evidence in this case showed that the victim was killed by some criminal agent. There was evidence from which the jury could have found that the petitioner, at the time of her death, was the only person with an opportunity to kill her. Other circumstantial evidence tended to prove his guilt. The totality of the evidence which the jury could have reasonably believed was such that excluded every reasonable hypothesis except that the petitioner was the killer.

2. The trial court did not err in refusing to set aside the verdict on the grounds of alleged juror misconduct. The juror, Ms. Davis, revealed on *voir dire* that she had previously read newspaper accounts concerning the case but that she had little recollection of what she had read. Counsel did not object to the juror being seated on the jury and took the risk that other evidence might refresh her recollection.

The other juror, Ms. Grimm, was not asked if she had any association with law enforcement. She was asked if she had "ever been engaged in law enforcement work." Considering the phrasing of the question, her response could not be held to be untruthful. Even if she had been asked, the association she had nine years earlier with the CID in which her duties were to cut grass, act as a duty driver, secretary and mail clerk, were so tenuous an association with law enforcement work that the trial judge would not have been required to set aside the verdict.

In neither case was there any evidence that a juror failed to answer honestly a material question on *voir dire* and no further evidence that a correct response would have produced a valid basis for a challenge for cause. *McDonough v. Greenwood*, 464 U.S. 548 (1984).

3. The trial court did not err in admitting evidence of defendant's statements. *See Evans-Smith v. Commonwealth*, 5 Va. App. 188, 361 S.E.2d 436 (1987).

4. The trial court was not required to set aside the verdict due to arguments made in the Commonwealth's opening statement to which no objection was made. Rule 5A:18. Likewise, the Court will not consider on appeal

objections to matters argued in closing arguments which were not raised in the trial court. Rule 5A:18.

5. The trial court acted properly in curing any misstatement made by the Commonwealth in the closing argument and therefore was under no duty to set aside the verdict. *Lewis v. Commonwealth*, 211 Va. 80, 175 S.E.2d 236 (1970).

6. The trial court did not err in refusing to permit petitioner to impeach the general character of his own witness. There was no evidence of any drug involvement with Robert Rivera. The fact that Rivera may have had pending marijuana charges in Texas was not admissible to show that he had some connection with the Evans-Smith murder in Virginia merely because he was at a farm next door about two hours after the killing. *See Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923).

7. The trial court did not abuse its discretion in denying a motion for a change of venue. *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985); *Tuggle v. Commonwealth*, 228 Va. 493, 503, 323 S.E.2d 539 (1980).

8. The trial judge was not required to reduce the jury's sentence to the same or a lesser sentence than was imposed in the first trial by that jury. *See Chaffin v. Stynchcombe*, 412 U.S. 17 (1973).

9. The trial court did not err in its determination that petitioner's retrial was not barred by Virginia's speedy trial statute. See Code § 19.2-234. The delay was concurred in by both defendant and the Commonwealth's attorney. *Stephens v. Commonwealth*, 225 Va. 224, 301 S.E.2d 22 (1983). The petitioner has not raised on appeal

the issue of whether or not the transcript as certified by the trial judge was accurate.

A Copy,

Teste:
Patricia G. Davis, Clerk

By: /s/ Cynthia L. McCoy
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 26th *day of* June, 1990.

William Evans-Smith,

Appellant,

against Record No. 1268-89-4
Circuit Court No. 4700

Commonwealth of Virginia,

Appellee.

(Filed Nov. 2, 1990)

Upon a Petition for Rehearing
Before Judges Keenan, Moon and Willis

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 1st day of June, 1990, and grant a rehearing thereof, the said petition is denied.

A Copy,

Teste:
Patricia G. Davis, Clerk

By: /s/ Cynthia L. McCoy
Deputy Clerk

IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE COUNTY OF LOUDOUN, VIRGINIA TO-WIT: NOVEMBER 5, 1990.

THE FOREGOING ORDER WAS THIS DAY RECEIVED IN SAID OFFICE AND RECORDED.

/s/ Joyce M. Long
DEPUTY CLERK

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building, City of Richmond on Friday *the* 14th *day of* September, 1990.

William Evans-Smith,

Appellant,

against Record No. 901018
Court of Appeals No. 1268-89-4

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ R. R. Buriak
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

WILLIAM EVANS-SMITH, Petitioner,	)	
V.	)	CIVIL ACTION NO. 91-1547-AM
JOHN B. TAYLOR, Respondent.	)	

ORDER

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the respondent for summary judgment is granted.

2. The motion of the petitioner for summary judgment is denied.

3. The petition is dismissed.

/s/ A.V.B. Jr.
United States District Judge

Alexandria, Virginia
February 28th, 1992

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

WILLIAM EVANS-SMITH, Plaintiff, -vs- JOHN B. TAYLOR, Defendant.	CIVIL ACTION NO. 91-1547 AM

Friday, February 28, 1992
(Filed Apr. 13, 1992)

Alexandria, Virginia

Transcript of motion proceedings in the above-captioned matter.

BEFORE:
The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:
FOR THE PLAINTIFF:

J. FREDERICK SINCLAIR, ESQUIRE
OF: COHEN, DUNN & SINCLAIR, P.C.
221 S. Alfred Street
Alexandria, Virginia 22313

* * *

[p. 18] THE COURT: The defendant's motion for summary judgment will be granted.

Insofar as the sufficiency of the evidence is concerned, the petition was filed and indeed the reply to the defendant's motion seems to be proceeding on the State standard, that is, whether where there is circumstantial evidence, the burden is on the Commonwealth to prove guilt to [p. 19] the exclusion of any reasonable hypothesis of innocence; and that is not the standard, of course. The Federal standard and the constitutional standard, at least as far as this Court is concerned, is whether any rational trier of fact could have found from the evidence beyond a reasonable doubt the essential elements of the crime charged.

The burden is on the Federal Court in this situation to review the matter de novo, and I have.

But the evidence that the petitioner points out, that is the drag marks, it's doubtful, according to the petitioner, that they could have been made by the victim's heels because she was, there was evidence that that wouldn't have made those kinds of scuff marks, the likelihood or unlikelihood that the defendant, petitioner, could have carried this 145-pound woman upstairs; the evidence of a possible sexual assault, and a robbery; the evidence could, the jury could have inferred that another person could have been in the home, the evidence as to the hair types, that another car was seen leaving the area, that only one or very little blood samples consistent with the petitioner were found; the inferences to be drawn from the scratch marks on his arms, these were things that were in his favor at trial, but the jury was not required to accept those in the face of evidence that would indicate that he was the only person at home, that he was, at least at part of the time when she was [p. 20] determined to

have died, they could have well believed that this business about a possible sexual assault and robbery was planted evidence to indicate that such a thing happened, when in fact it didn't, that there was no other car leaving, that the scratches were from the victim's fingernail, that his reactions after he found his wife's murder were susceptible to different inferences, that the inconsistencies in his own testimony about when she waved to him and where she was when she waved to him, the business about getting everybody together and discussing what went on, it seems to me these are things that the jury could weigh and were not required to accept the position that the petitioner took and the inferences that he sought to have drawn from that evidence.

I find that insofar as – and it's true that at the second trial, there was no motive shown, but – but Judge Chamblin's canvas of the evidence, and indeed there is no challenge to what he finds the testimony to have been at trial, and really there cannot be, his recitation of the evidence is accurate.

The petitioner just seeks to have other inferences drawn from that testimony. But the jury was not required to do that, and I find that a rational trier of fact could have found beyond a reasonable doubt from this evidence that the defendant was guilty of the murder of his wife.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 18, 1994

No. 92-6347
CA-91-1547-AM

WILLIAM EVANS-SMITH

Petitioner - Appellant

v.

JOHN B. TAYLOR

Respondent - Appellee

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Bert M. Montague
CLERK